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Appendix

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IN THE

Supreme Court of the United States

October Term, 1968

Number 76

PHILIP CARDINALE, JR.

Petitioner

VS.

STATE OF LOUISIANA,

Respondent

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SUPREME COURT OF THE UNITED STATES

NO. 76

PHILIP CARDINALE, JR. Petitioner

VS.

STATE OF LOUISIANA, Respondent

SUMMARY OF RELEVANT DOCKET ENTRIES

Tuesday, August 31, 1965 – Accused present after having waived extradition from Arizona; accused advised of nature of charge and advised of right to counsel, etc. Accused stated he was represented by Nathan Greenberg, Attorney, whose name was entered of record as counsel for the accused. (R. 1)

Tuesday, November 16, 1965 – Grand Jury returns true bill for murder. (R. 5)

Wednesday, December 8, 1965 – Accused accompanied by counsel entered plea of not guilty. Accused granted forty-five days to file special pleadings. (R. 6)

Monday, March 14, 1966 – Court denied motion to suppress filed by defendant. Accused re-arraigned and pleaded not guilty. Trial set for week beginning

March 21, 1966. (R. 14)

Monday, March 21, 1966 – Court ordered trial continued to May 2, 1966. (R. 16)

Monday, May 2, 1966 – Trial commenced. (R. 17) Prospective jurors called and by noon on Wednesday, May 4, 1966, all jurors had been selected. (R. 31) Counsel for the state now presented his opening statement before the Petit Jury and during the course of his presentation Defense Counsel moved for a mistrial. (R. 31)

"The Court now directed the members of the Petit Jury to retire to the Jury Room in custody of the Sheriff.

"Defense Counsel now presented argument in support of his motion for a mistrial and answering argument was presented by the State. Defense Counsel's motion for a mistrial was denied by the Court, to which ruling Mr. Greenberg reserved a Bill of Exceptions." (R. 31, 32)

Thursday, May 5, 1966 – The prosecution then proceeded to call witnesses and during the course of the trial, "the question of admissibility or the denial of admissibility of certain statements made by the defendant having been placed before the Court, the Court nor ruled that said statements are admissible,

to which ruling defense counsel reserved a Bill of Exceptions." (R. 40)

"The members of the Petit Jury returned into Court and took their seats in the jury enclosure.

"Robert Henry was called by the State, and having been previously sworn, was examined in chief by Counsel for the State. Objection was raised by the Defense and the Court directed that the Petit Jurors be retired to the jury room in custody of the Sheriff. Argument was presented by the State and the Defense and the Court then overruled Defense Counsel's objection, to which ruling Counsel for the Defense reserved a Bill of Exceptions.

"The members of the Petit Jury returned into court and took their seats in the jury enclosure.

"Direct examination of the witness, Robert Henry, was resumed by the State.

"The Court now ordered recess for the evening meal and the Petit Jurors retired to the jury room in custody of the Sheriff and the defendant was remanded in custody of the Sheriff.

"Recess over — Court reconvened.

"The defendant was present in court seated

beside his counsel.

"In connection with Defense Counsel's previous Bill of Exceptions and calling to the Court's attention of certain law, Counsel for Defense now moved for a mistrial and the Court declared a brief recess. The defendant remained in court seated besides his counsel.

"Recess over – Court reconvened.

"The defendant was present in court seated besides his counsel.

"The Court denied Defense Counsel's motion for a mistrial, to which ruling Counsel for Defense reserved a Bill of Exception.

"The members of the Petit Jury returned into court and took their seats in the jury enclosure. (R. 41)

"Robert Henry was called to the witness stand, and having been previously sworn, was cross-examined by Counsel for Defense." (R. 41)

Friday, May 6, 1966 – "At this time Defense Counsel announced that it had no witnesses to offer." (R. 44)

Jury retired and then finds defendant guilty as

charged. (R. 45)

Tuesday, July 19, 1966 – Death sentence. (R. 47)

Thursday, October 6, 1966 – Per curiam on Bill of Exceptions, as follows:

"Per curiam"

"To and for the Honorables, the Supreme Court of the State of Louisiana.

"The accused has reserved fourteen (14) separate Bills of Exceptions herein. Bills numbered One (1) and Two (2) were predicated upon rulings made prior to trial by the Hon. Rudolph M. McBride, now deceased, to which bills this writer is unable to offer per curiams. Bill numbered Fourteen (14) flows from a denial of an application for a new trial. In ruling upon each objection during the proceedings, this Court endeavored to supply its reasons as clearly and in as much detail as possible. These are incorporated in the transcript of the trial, a complete copy of which is being furnished your Court. In order that your Court can best appreciate the circumstances under which each objection and each ruling was made, this Court has prepared a list of the Bills of Exceptions and has, for convenience, identified the pages of the transcript relating to the objections and the rulings. This has been adopted as the more simple

and expedient method for purposes of appellate review. It further serves to spare this Court a duplication of effort in the preparation of individual per curiams for each Bill of Exceptions.

"Following is a list of the Bills of Exceptions with transcript page references:

"Bills of Exceptions:

No. 3 P. 7 to P. 17. See P. 18 where Court instructed jury concerning District Attorney's opening statement.

No. 4 P. 52 to P. 54

No. 5 P. 26 to P. 29

No. 6 P. 132 to P. 345

No. 7 P. 204 to P. 214. Recommend Appellate Court read from beginning of testimony at P. 199 of transcript to learn how police officer first encountered accused.

No. 8 P. 225 to P. 226. Recommend Appellate Court read from P. 221.

No. 9 P. 227 to P. 261.

No. 10 P. 272 to P. 291.

No. 11 P. 306 to P. 313.

No. 12 P. 326

No. 13 P. 341 to P. 343. Recommend Appellate Court read Trial Court's comment beginning bottom of P. 343, omitted in Bill of Exceptions.

"October 6, 1966

/s/ Morris G. Becnel
JUDGE
(R. 142 - 143)

Thursday, October 6, 1966 - Suspensive appeal granted.
(R. 166)

THE STATE OF LOUISIANA
Twenty–Fifth Judicial District
Parish of Plaquemines

The Grand Jurors of the State of Louisiana, duly empanelled and sworn, in and for the body of the Parish of Plaquemines in the name and by the authority of said State, upon their oath, Present: That Philip Cardinale, Jr. late of the parish of Plaquemines on or about the 10th day of August in the year of our Lord, One Thousand Nine Hundred and Sixty-Five with force and arms, in the Parish of Plaquemines aforesaid, and within the Jurisdiction of the Twenty–Fifth Judicial District Court, in and for the Parish of Plaquemines aforesaid, did murder Mary Agnes Buford contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of said State.

Leander H. Perez, Jr.
District Attorney, Twenty-Fifth Judicial District

* *

No. 12069

The State of Louisiana

vs.

Philip Cardinale, Jr.

INDICTMENT FOR MURDER

Foreman of the Grand Jury,
Parish of Plaquemines
Filed November 16, 1965

TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 12069

STATE OF LOUISIANA

VS.

PHILIP CARDINALE, JR.

BILL OF EXCEPTIONS
NO. 3

BE IT REMEMBERED that on the trial of this cause at the May term of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana, on the 4th day of May, 1966, the state to maintain the issue on their part, did make an opening argument to the jury, wherein the District Attorney did, in said opening argument, state as follows, to wit:

> "Further, Cardinale voluntarily admitted to Detective R. Henry that Cardinale was engaged in a similar incident and had beaten a woman in New Orleans for which he served a prison term and after his release admitted looking for the woman with the intent of killing her for her having signed a complaint against him."

That immediately after the aforesaid statement was made in the said opening argument, the defendant did, through his counsel, move for a mistrial; that the basis of the said motion was twofold, i.e., (1) that the said statement sought to accomplish indirectly that which the state could not accomplish directly, namely, to place before the jury evidence of a prior conviction of the said defendant for an allegedly similar incident, whereas, under the provisions of L.S.A.–R.S. 15:495, evidence of a prior conviction of a defendant can be used only for purposes of impeachment; and, (2) that the said statement further seeks to use the prior conviction and alleged accompanying act of taking the gun and looking for the woman as a means of showing specific intent to commit the crime charged herein; that the alleged incident described by the District Attorney in the said opening statement concerning the looking for the woman with the gun purports to relate to an incomplete offense, and not of a completed crime; that the State of Louisiana, through the District Attorney, sought to justify the said statement in his opening statement under the provisions of L.S.A.–R.S. 15:445 and 446.

That after hearing the argument on the said motion for a mistrial, the Judge ruled that the aforesaid statements contained in the opening statement were not improper for the reason that the opening statement was not evidence, and that he would rule upon the admissibility of the alleged evidence at the time that the District Attorney sought to introduce the same through proper testimony,

and to which ruling of the Court, the defendant, by his counsel, then and there excepted for the reason that the said statement was highly prejudicial and tended to be inflammatory, that the said statement seeks to violate the provisions of L.S.A.–R.S. 15:495, and that the said statement is not admissible under the provisions of L.S.A.–R.S. 15:445 and 446, under the decision of *State v. Rives*, 193 La. 186, 190 So. 374 (1939).

Ant the defendant, Philip Cardinale, Jr., through his counsel aforesaid, having submitted this his bill of exceptions to the District Attorney, now tenders the same to the Court and prays that the same be signed and filed by the Judge of this Court pursuant to the statute in such case made and provided, which is done accordingly this 19th day of July 1966.

s/ Morris G. Becnel
JUDGE

No Per Curiam comment required. See general Per Curiam.

s/ Morris G. Becnel
JUDGE

[R. 106 – 107]

TWENTY–FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 12069

STATE OF LOUISIANA

VS.

PHILIP CARDINALE, JR.

BILL OF EXCEPTIONS
NO. 10

BE IT REMEMBERED, that on the trial of this cause at the May term of the Twenty–fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana, on the fifth day of May, 1966, the state, to maintain the issue on their part, did call as a witness Detective Robert Henry of the Tuscon Police Department, who was examined as follows by the State to-wit:

That the defendant objected to the admissibility of the aforesaid statements allegedly made by the said defendant with reference to any other alleged offenses allegedly committed by the said defendant, and particularly any references to the defendant allegedly taking a gun and looking for the woman who was his alleged prosecutrix in the first offense as a means of

showing specific intent to show the crime charged herein; that the said statements sought to accomplishindirectly that which the state could not accomplish directly, i.e., (1) to place before the jury evidence of a prior conviction of the said defendant for an allegedly similar incident, whereas under the provisions of L.S.A.—R.S. 15:495, evidence of a prior conviction of a defendant can be used only for purposes of impeachment; and (2) that the said statement further seeks to use the prior conviction and alleged accompanying act of taking the gun and looking for the woman as a means of showing specific intent to commit the crime charged herein; that the alleged incident described by the District Attorney in his opening statement, described by Detective Robert Henry of the Tuscon Police Department, and again referred to by the District Attorney in his closing arguments and concerning the looking for the woman with the gun purports to relate to an incomplete offense, and not of a completed crime; that the State of Louisiana, through the District Attorney, sought to justify the said statement under the provisions of L.S.A.—R.S. 15:445 and 446; that the said prior conviction related to a charge of crime against nature only, as will more fully appear by reference to the certified copy of the information and the plea and sentence thereon annexed hereto and made a part hereof.

That after hearing the argument on the said objection, the Judge ruled that the aforesaid statements contained in the testimony were not improper for the reason that the said statements were made by the

defendant freely and voluntarily at the time when he made his alleged confession and/or admissions and/or declarations against interest and were therefore admissible; that the defendant, by his counsel, then and there excepted for the reason that the said statement was highly prejudicial and tended to be inflammatory, that the said statement or testimony seeks to violate the provisions of LSA-R.S. 15:495, and that the said statements are not admissible under the provisions of LSA-R.S. 15:445 and 446 or under the decision of *State vs. Rives*, 193 La. 186, 190 So. 374 (1939).

And the defendant, Philip Gardinale, Jr., through his counsel aforesaid, having submitted this bill of exceptions to the District Attorney, now tenders the same to the Court and prays that the same be signed and filed by the Judge of this Court pursuant to the statute in such case made and provided, which is done accordingly this 19th day of July 1966.

s/ Morris G. Becnel
JUDGE

[R. 123 — 125]

No per curiam comment required. See general per curiam.

s/ Morris G. Becnel
JUDGE

DECREE

SUPREME COURT OF LOUISIANA

No. 48,769

STATE OF LOUISIANA

versus

PHILIP CARDINALE, JR.

Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana; Honorable Morris G. Becnel, Judge.

HAMITER, Justice.

Philip Cardinale, Jr. was charged in an indictment with having murdered, on or about August 10, 1965, one Mary Agnes Buford. Following a trial by a jury, which resulted in a verdict of guilty, he was sentenced to death. On this appeal he relies on fourteen bills of exceptions to obtain a reversal of his conviction and sentence.

Bill No. 1 was reserved to the court's refusal to order the state, as requested in defendant's prayer for oyer, to produce "All statements obtained by the prosecution from any and all witnesses or other third persons in connection with the prosecution of the defendant herein."

There is no merit in the bill. In *State v. Haddad*, 221 La. 337, 59 So.2d 411, we said: "It is now so firmly

established in our jurisprudence that a defendant in a criminal case is not entitled to a pre-trial inspection of written confessions of co-defendants, written statements of witnesses, or police reports in the hands of the sheriff, the police department, or the district attorney that we fail to understand why defense counsel continue to present such arguments to us on appeal. *State v. Lee*, 173 La. 966, 139 So. 302; *State v. Dallao*, 187 La. 392, 175 So. 4; *State v. Williams*, 211 La. 782, 30 So.2d 834; *State v. Mattio*, 212 La. 284, 31 So. 2d 801; *State v. Simpson*, supra.***" See also *State v. Cleveland and Morris Johnson*, 249 La. 950, 192 So.2d 135.

Bill of exceptions Nos. 2 and 6 involve the same subject matter and were taken under the following circumstances: On August 12, 1965, or two days after the murder (by bludgeoning of the victim), a search warrant was obtained by law enforcement officers authorizing the search of a described Dodge automobile at a given address, this for the purpose of seizing "Sharp metal object or objects, axe, large knife, piece of metal used as a club hammer, hatchet or hatchets, human Hair, Human Blood, female clothing, shoes, ladys purse." Prior to the trial the defendant moved to suppress some of the evidence seized by means of the warrant, and he reserved Bill No. 2 to the court's overruling such motion. Bill No. 6 was taken during the trial when the court denied defendant's objection to the introduction of human hair and blood found in the trunk of the searched vehicle. (Two other search warrants obtained at the same time authorized search for the

identical articles in a building and a shed located at the mentioned address. However, evidence taken in connection with the motion to suppress revealed that the searches made under these warrants produced nothing for the state to use in the prosecution. Consequently, the court's overruling the motion to suppress as to them was not prejudicial and is immaterial here.)

The accused concedes that the warrant is in proper form and was issued on probable cause. (We have examined the application for the warrant, but in view of defendant's concession it is unnecessary to discuss in detail the fact of the issuance thereof.) The sole basis for urging the alleged invalidity of the warrant, and the impropriety of introducing the evidence obtained through its use, is that such was directed against the obtaining of items purely "evidentiary" in nature and, therefore, not subject to seizures and subsequent use in the prosecution of the cause.

In connection with these bills the defendant contends that the provisions of LRS 15:42 and 43 (1928 Code of Criminal Procedure) do not include "evidentiary" things as among those which might be the subject of a search warrant; and that, because these sections limit the objects for which a search can be made, the warrant herein authorizing a search for the items sought was improper and illegal. However, LRS 15:41 (1928 Code of Criminal Procedure), which must be read in connection with the two succeeding sections, grants to the courts unlimited

authority to issue search warrants. And the authority therein granted is circumscribed, we think, only by the provisions of Article I, Section 7 of the Louisiana Constitution which provides that no search or seizure shall be made except upon warrant issued "probable cause" (such probable cause usually being a showing of nexus between the object sought and the commission of a known or suspected crime).

The mentioned Sections 42 and 43 do not, in our opinion, constitute a limitation of that authority; rather, they provide additional instances where a warrant might issue. Thus, Section 42 permits the obtaining of possession of stolen property and Section 43 authorizes seizure of property which, by nature, is contraband and to which, therefore, the state has the right of possession without there necessarily having been a crime committed.

The defendant additionally contends that the search and seizure, as well as the subsequent use in the prosecution of the defendant, of the purely evidentiary items violated his rights provided for in Article IV and V of the Federal Constitution. He relies on *Gouled v. United States*, 255 U.S. 298, 65 L.Ed. 647, as approved in *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877.

Conceding, arguendo, that some of the broad language used in the *Gouled* opinion might furnish some support to defendant's contention, the effect of that opinion has been specifically limited in the more recent

case of *Warden v. Hayden*, U.S. , 18 L. Ed.2d. 782. In the latter the court approved the seizure of wearing apparel of the accused and the introduction thereof into evidence. In so doing it observed: "We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are 'mere evidence.' The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. The Court of Appeals, however, felt 'obligated to adhere to it.' 363 F. 2d. at 655. We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment."

The court then pointed out that the only proper application of *Gouled* would be in cases where the items seized were private papers, writings, or documents of the suspect to the extent that their involuntary seizure and use as evidence against him "would be, in effect, as ruled in the *Boyd* case, to compel the defendant to become a witness against himself." And the court concluded: "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d. 908, 86 S. Ct. 1826. This case thus does not require that we

consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

Even less "testimonial", or "communicative" in nature, were the objects seized and introduced into evidence in the instant case, they consisting of the hair and blood of the victim, and not the property of defendant at all.

We find no error, therefore, in the court's overruling the motion to suppress (bill No. 2) and allowing the evidence obtained through use of the warrant to go to the jury (bill No. 6).

Bill of exceptions No. 4 is leveled at the failure of the Clerk of Court to read the indictment, as well as the plea of not guilty of the defendant, to the jury prior to the commencement of the taking of testimony, as is provided in LRS 15:333 (1928 Code of Criminal Procedure). *State v. Ducre*, 173 La. 438, 137 So. 745 is cited as authority to support the defendant's contention that such failure constitute reversible error.

In view of the holding of this court in *State v. Leslie*, 244 La. 921, 155 So. 2d. 19 we are of the opinion that this bill is without substance. The record reflects that initially herein the clerk did, inadvertently, omit the reading of the indictment and the plea of not guilty of the defendant to the jury. However, while the state's first

witness was testifying the court itself took cognizance of such omission. And at that time it interrupted the proceedings and ordered that the indictment and the plea of the accused be then read. This was done. Incidentally, counsel for the accused offered no objection to the omission as an initial step in the trial.

In *State v. Leslie, supra*, under similar circumstances, we said: " The reading of the plea to the jury, like the opening statement of the district attorney which follows it in statutory sequence, is mandatory. This means that when timely objection is made to its omission, the failure of the trial judge to require that the plea be read is error. See *State v. Gayton*, 221 La. 1115, 61 So. 2d 890 and *State v. Ducre*, 173 La. 438, 137 So. 745.

"In the instant case, however, the defense made no objection at the time of the omission. The trial proceeded. The district attorney made his opening statement. Defense counsel waived an opening statement. The district attorney commenced the introduction of evidence. The testimony of two witnesses had been adduced by the state, when objection was raised for the first time. Thereupon, the court required the plea to be read to the jury and overruled the objection. Under these circumstances, we are of the opinion that the right of the defendant to have the plea read in proper sequence was waived.

"* * * * * * * * * *

"The defendant relies principally upon *State v. Ducre, supra*, wherein the Court held that the refusal of the trial judge to order the district attorney to make an opening statement as required by Article 333 of the Code of Criminal Procedure (now LSA–R.S. 15:333) was reversible error. In that case, unlike the present one, the defendant made prompt request of the court for the ruling prior to the introduction of evidence. The case was thus distinguished in *State v. Shearer*, to which reference has been made." (Emphasis ours)

Bill of exceptions No. 5 was reserved to the court's permitting Jim Hoffman, who had been qualified by the state as an expert in photography (preparatory to introducing certain photographs), to testify with regard to a sketch he had made of the scene of the crime. The defense contends that the qualification of the witness in the field of photography did not permit his giving testimony with a plat prepared by him.

It was established that the diagram had been drawn by the witness according to the things he had actually seen while he was at the locale. As the trial court observed, when it overruled the objection, "It is within the realm of his own knowledge" to prepare and testify from the sketch. Consequently, no expert qualifications were required for such testimony.

We perceive no error in the court's ruling.

Bills of exceptions Nos. 7 and 9 were taken to the introduction of an inculpatory statement (or confession) of the accused made to law enforcement officers of Tucson, Arizona. There is no contention whatsoever that the statement was not completely voluntary, and the evidence itself shows quite the contrary. The accused voluntarily sought out and surrendered himself to the Tucson police officers, who at such time had no knowledge of the instant crime or that the defendant was wanted as a fugitive; he told them he was probably wanted in Louisiana in connection with the crime; and, after being advised of his right to counsel, he freely recited the facts to which the officers from Tucson testified.

In view of these circumstances, which are not disputed, the guidelines set down in *Escobedo v. Illinois*, 378 U.S. 490, 12 L. Ed. 2d. 977, are not applicable. See also *State v. Cleveland and Morris Johnson, supra*, and *State v. Aherns*, 250 La. 391, 196 So. 2d. 250.

The sole basis for the objection to the statement is that the accused was not offered the services of an attorney as required by the decision in *Miranda v. Arizona* 384 U.S. 436, 16 L.Ed.2d. 694. But inasmuch as the trial of this defendant comeenced on May 2, 1966, prior to the effective date of the *Miranda* case (which was June 13, 1966), the decision therein is not applicable. See *Johnson v. State of New Jersey*, 384 U.S. 719, 16 L. Ed. 2d. 882; *State v. Evans*, 249 La. 861, 192 So. 2d 103; *State v. Gregoire*, 249 La. 890, 192 So. 2d 114; *State v. Cleveland*

and Morris Johnson, supra, and *State v. Aherns, supra.*

Moreover, the circumstances recited above of the giving of the statement in the instant case, we think, take it out of the rule laid down in *Miranda*. Therein the United States Supreme Court prefaced its holding by pointing out that its guidelines were to apply to statements "stemming from custodial interrogation" of the defendant, and that "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action***." And it concluded its discussion with the following observation: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (Emphasis ours)

The objection to the introduction of the inculpatory statement was, therefore, groundless.

Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.

We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.

The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: " Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." And we held: "The confession is not rendered inadmissible because it admits

offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution."

The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34.

On cross examination of one of the state's witnesses (Deputy Ernest Amos) defense counsel attempted to elicit from him whether the defendant had ever denied committing the crime. The state's objection to the question was sustained and bill of exceptions No. 8 was reserved. We find no error in the ruling.

The cases cited by defendant do not support his contention that the action constituted reversible error. In fact, their holdings are to the contrary. Thus, in *State v. Johnson*, 35 La. Ann. 968, the court held that certain

self-serving statements of an accused were properly excluded and observed: "***The rule is undoubted that, when confessions or statements of an accused are offered, they must go in all together; but that only applies to declarations made at one time or having some connection with each other.

"Here we find no connection whatever between the admitted confessions and the rejected declarations, the former having been made six weeks after the latter. Manifestly, the prior self-serving declarations could not weaken the effect of the latter self-incriminating ones. The former are rejected as unworthy of reliance, because springing, presumably, from self-interest; the latter are received for precisely the converse reason." To the same effect are *State v. Gunter, 30 La. Ann. 536* and *State v. Rutledge*, 37 La. Ann. 378.

It is not contended here that the self-serving declarations about which the witness was questioned were made in connection with any confession or inculpatory statement, and, particularly, there appears no confession made in the presence of this witness. Moreover, the witness stated unequivocally that he had no recollection of any conversations he might have had with the defendant.

Bill of exceptions No. 11 was taken to the court's accepting the witness Milton Cox, over defendant's objection, as an expert "criminalist" — one versed in the skills and techniques involved in laboratory crime

detection — to lay the foundation for his testimony connecting blood, hairs, etc. found in the defendant's automobile with that of the deceased, and also showing that shoes found in the possession of defendant contained soil the same or similar to that where deceased's body was found.

The record shows that the trial judge was satisfied as to the witness' qualification. In *State v. Stahl*, 236 La. 362, 107 So. 2d 670 we observed: "***The rule is well settled that whether a witness is entitled to be heard in the capacity of expert is within the trial judge's province to decide, and his ruling will not be disturbed where no error appears.***"

We have examined the evidence relating to Cox's qualification in the stated field and find that his formal education as well as his practical experience in this area fully justified the court's acceptance of him as an expert. There is, therefore, no merit in the bill.

Bill of exceptions No. 12 was reserved to the testimony of Cox that certain shoes exhibited to him appeared to have been recently washed, it being argued that he had not been qualified as an expert to express an opinion on such matters. We conclude that the court was correct in its observation that the objection was not well grounded for the reason that no special qualifications were required to answer the question and that "anyone of a number of individuals in this court room could perceive

and observe that a piece of leather has been soaked and wet and is moist." The bill is without substance.

While the witness was testifying regarding a hatchet which, as had been established by other witnesses, had been taken from the defendant's abandoned truck, he stated that he had found no evidence of blood on the hatchet. Originally he had said that he did not have the hatchet with him. Later he stated that he was in error and that he did have it. When the prosecuting attorney asked to see it defense counsel objected, urging that it was irrelevant since there were no blood stains found on it and that he had not had an opportunity to cross examine the witness about the hatchet because he had said he did not have it. On completion of the state's questioning of the witness, defense counsel was permitted to cross examine him at length about his negative findings with regard to the hatchet. When the state offered to introduce the hatchet into evidence the defendant objected. The court observed (in effect), in ruling on the objection, that out of an abundance of precaution he would sustain the objection. Whereupon defense counsel moved for a mistrial because the hatchet "has been exhibited to the jury and it is prejudicial and *de*flamatory" (inflamatory). Bill of exceptions No. 13 was reserved to the court's overruling the motion for a mistrial.

We find no merit in the bill. First of all we note that, without taking a bill in connection with his original objection or reserving his rights thereunder, defense

counsel himself questioned the witness, concerning the hatchet. Moreover, it had been shown that the victim had suffered severe fractures and lacerations of the head and upper portion of the body, caused by a fairly sharp and rather heavy object such as a cleaver or hatchet. It had also been shown that the hatchet referred to by the witness had been found in defendant's truck in his presence and to which he voluntarily directed police officers. Under these circumstances it appears to us that his ownership and possession of such an instrument was relevant, even though no blood stains were found on it. The result of Cox's testimony would not render the introduction less relevant, but would only lessen the probative effect of its having been in defendant's possession, redounding to his benefit rather than to his prejudice. Besides, inasmuch as the court did not permit the hatchet to go to the jury, we do not perceive how merely viewing an ordinary hatchet during the examination of the witness could have caused such alleged inflamatory and prejudicial results in the minds of the jury.

Bill of exceptions No. 14 is directed to the fact that the jury deliberated only one and one-half hours before returning their verdict of guilty. Defendant urges that the short time taken "clearly indicates a lack of serious deliberation upon a matter so serious as the life or death of the accused, and for this factor alone [this bill] should be the basis of a mistrial."

We know of no law requiring any specific time for

jury deliberations. Nor can we presume prejudice merely from their reaching an early verdict. Defense counsel says in his brief that the state presented its evidence for two and one-half or three days. The trial judge has not favored us with a per curiam to this bill, but the entire record has been sent to this court and we note that the defense offered no rebuttal evidence whatsoever. In such circumstances we cannot, without a more positive showing, say that the jury erred in its deliberations. The bill is without merit.

Before closing this opinion we feel compelled to note the lack of per curiams by the trial judge. In no instance has he prepared one. Rather, he filed what he terms a "general per curiam" wherein he refers to the pages of the entire transcript (three volumes) that relate to the proceedings during which the respective bills were reserved. While such procedure may, as suggested by the judge, provide a "simple and expedient method" of presenting his views, we do not deem it a satisfactory method of presentation for our appellate review.

For the reasons assigned the conviction and sentence are affirmed.

DESIGNATION OF SINGLE APPENDIX

(A) Copy of Indictment.

(B) Summary of relevant docket entries relative to arraignment, introduction of certain testimony, return of verdict of the jury, and sentence.

(C) Bill of Exceptions No. 3 and Bill of Exceptions No. 10.

(D) Per Curiam of the Trial Judge with reference to Bills of Exceptions.

(E) Decree of the Louisiana Supreme Court.

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ATTORNEY FOR DEFENDANT

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1968

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STATE OF LOUISIANA,

Respondent,

versus

PHILIP CARDINALE, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Supreme Court of the United States

No.

STATE OF LOUISIANA,

Respondent,

versus

PHILIP CARDINALE, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The instant application for a writ of certiorari or review is filed herein by Philip J. Cardinale, Jr., defendant herein. Defendant was convicted of murder in the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana, and was sentenced to death. This application for a writ of certiorari or review stems from a decree of the Supreme Court of Louisiana handed down on January 15, 1968 which affirmed defendant's conviction. An application for rehearing was filed timely, and on February 19, 1968, the application for rehearing was denied.

LOWER COURT OPINIONS

The opinion of the Supreme Court of Louisiana in the instant case is found at ____ La. ____, 206 So. 2d 510. The decree of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines is unreported. Copy of the opinion of the Supreme Court of Louisiana is annexed hereto.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, U.S. Code, Section 1257, seeking to review the judgment of the Supreme Court of Louisiana handed down on January 15, 1968. An application for rehearing was timely filed, and on February 19, 1968, the said application for rehearing was denied. The denial of the application for rehearing was entered on February 19, 1968.

We respectfully submit that this Honorable Court has jurisdiction to review the decree in question herein by writ of certiorari pursuant to the provisions of 28 U.S. Code, Section 1257, and Rule 22, Supreme Court Rules.

THE ISSUES

The issues in the instant case concern the constitutionality of the procedure used herein in the trial court to convict the defendant of murder. In the instant action, homicide was allegedly committed on August 10, 1965, and thereafter the defendant turned himself in in Tucson, Arizona. During the course of his custodial interrogation in Tucson, Arizona, he referred to a prior conviction occurring in Louisiana, which prior conviction was for a crime against nature occurring on July 12, 1963, and causing the defendant to be sentenced to serve three months in the Parish Prison on March 25, 1964 (T. 126, 467). Defendant further stated during the course of his custodial interrogation that after he served his time in the Orleans Parish Prison, he went looking for his alleged prosecutrix with a gun for the stated purpose of killing her; however, he never did find her, and, therefore no further offense was committed (T. 496-510).

In the opening statement of the District Attorney for the Parish of Plaquemines, Louisiana, he referred to the alleged oral confession and particularly the alleged refer-

ence to the alleged prior offense. During the course of the interrogation by an officer from Tucson, Arizona, defendant was interrogated at length about the prior offense and the episode involving going looking for the woman with a gun. In the closing argument, the District Attorney again emphasized the prior offense and the subsequent episode relating to looking for the woman. Timely objection to this testimony and the reference thereto in the opening and closing statement was made by the defense, and bills of exception were reserved, without avail. In commenting upon the issue raised herein, the Louisiana Supreme Court stated:

> "Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.
>
> "We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.
>
> "The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928) Code of Criminal Procedure) which provided: 'Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any excul-

pation or explanation that the whole statement may afford.' And we held: 'The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution.[1]

"The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34."

The issue presented by the instant application for a writ of certiorari or review has been crystallized in the recent dissenting opinion of Mr. Chief Justice Warren and concurred in by Mr. Justice Fortas in the decision of *Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967), the recidivist decision, wherein the issue presented by the instant case is highlighted as follows:

"* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose

> other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justfied because the accused is a 'bad man,' without regard to this guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'"

Although the *Spencer* case dealt with the question of a recidivist statute, it clearly indicates that the issue presented by the instant case is basically one of fairness. To illustrate, in *Cardinale*, the defendant pleaded guilty to a "crime against nature" approximately seventeen months prior to the charge of homicide in the instant case. On July 12, 1963, the defendant herein, Cardinale, was charged with having committed the "crime against nature", and he pleaded guilty to the charge and was sentenced to serve a term of ninety (90) days in Orleans Parish Prison on March 25, 1964. The alleged homicide in the instant case charged the occurrence of a murder on August 10, 1965, in Plaquemines Parish, Louisiana. After the alleged homicide, defendant left the State of Louisiana and subsequently voluntarily surrendered to the Tucson, Arizona, police authorities. During the course of his interrogation in Tucson, Arizona, he referred to the prior offense of which he was convicted and sentenced in March of 1964 in his purported oral confession. Defendant stated to the Tucson, Arizona

police that after he had served his sentence for the crime against nature, he went looking for the prosecutrix afterwards in the French Quarter with a gun, that he never did find the woman, but that if he had found her he would have killed her. Since the defendant stated to the Tucson authorities that he never did find the woman who was his alleged prosecutrix in the prior offense, he, therefore, never did complete any offense as to his alleged prosecutrix. Notwithstanding the fact that the defendant never did find the woman to harm her or complete any offense as to her, the District Attorney for the Parish of Plaquemines used these statements made by the defendant during the course of his oral confession and/or declaration against interest. At the trial, the District Attorney sought to use this portion of the confession under LSA-R.S. 15:445 and 15:446 for the purpose of showing a pattern and propensity towards serious and violent injury or harm in the prior offenses so as to show intent in the homicide herein. However, *State v. Rives*, 193 La. 186, 190 So. 374 (1939), holds directly against the State's argument; accordingly, the District Attorney changed his argument in the Supreme Court of Louisiana to justify the admissibility of the crucial statements contained within the oral confession on the ground that the said statements were part of an oral confession which must be admitted in its entirety, under the provisions of LSA-R.S. 15:450, which statute provides:

> "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The Supreme Court of Louisiana based its decision in *Cardinale* upon this latter theory to sustain the admis-

sibility of the statements contained within the aforesaid oral confession and/or declaration against interest.

Under the theory advanced by the Louisiana Supreme Court in the instant case, any time an accused makes a statement while he is being interrogated, that statement is admissible in evidence against him, regardless of the relevancy thereof. The tenor of the *Cardinale* case is quoted from the language of the Supreme Court decision hereinabove, and this confirms the statements by the Supreme Court of Louisiana made by that court to counsel for defendant during the course of oral argument. However, the tenor of the *Cardinale* decision and the blanket statement to the effect that anything stated by defendant while he is in the course of a confession and/or declaration against interest is admissible, is clearly contra to the spirit and basis of fairness to the defendant in obtaining a fair trial. The rule stated in a leading secondary authority is as follows:

> "A confession is not rendered ipso facto inadmissible by the declarant's unrelated and separate offense. In proving an admissible confession, the prosecution may introduce parts of the statement which show or indicate that the accused has committed other and separate offenses, where such admissions are inseparably connected with the confession of the crime charged. However, where the relevant parts dealing with the crime charged can be readily separated from those parts confessing to other crimes, most courts have required this to be done, although where such separation is impracticable the courts have almost uniformly held that a cautionary instruction to the jury will suffice. The determination of what is reasonably separable in this respect is usually left to the sound discretion of the trial court." Evidence, 29 Am. Jur. 2d. § 536, p. 587.

Among the decisions throughout the country following the preferable rule are *People v. Loomis*, 178 N.Y. 400, 70 N.E. 919 (1904); *State v. Skaug*, 161 P. 2d 708 (Nev. 1945); *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949); *State v. Nagy*, 27 N.J. Super 1, 98 A. 2d 613 (1953), and *State v. Myrick*, 181 Kan. 1056, 317 P.2d 485 (1957), all of which hold that where part of the confession relates to other offenses and that portion relating to the other offenses is separable, the reference to the other offense must be excluded. Your Honors will note that the so-called confession, and/or declaration against interest in the *Cardinale* case contained reference to another offense as well as to the alleged incident concerning the looking for the woman in the French Quarter with a gun, both of which were clearly separable from the alleged confession relating to the crime charged in the instant case. However, Your Honors will note that there was no attempt to separate one from the other, nor was there any attempt by the Trial Court to instruct the jury in connection with either the prior offense or the incompleted offense relating to the looking for the girl in the French Quarater with a gun. We respectfully submit that this was error on the part of the Trial Court which was perpetuated by the Supreme Court of Louisiana on different grounds.

Your Honors will note that the basis of the complaint relative to these declarations by the defendant is two-fold: (1) That the alleged oral confession contained reference to a prior offense where the defendant had not taken the stand, had not offered any evidence relative to his good character, nor had there been any basis for impeachment of the defendant's character, see LSA-R.S. 15:495; and (2) that the alleged incident concerning the looking for the woman in the French Quarter with a gun was an incomplete offense, and not a completed one; and that any

reference thereto could only have been for the purpose of bias or prejudice. *Cf. State v. Rives, supra.* We respectfully submit that the blanket admission of the entirety of the alleged oral confession without any attempt to separate these portions from the portion relating to the instant crime in question was prejudicial error and denied to defendant a fair trial.

Your Honors are well aware of the rule prohibiting the State from going into any other crime besides the crime with which the accused is charged. The basis of the rule is succinctly stated in Wigmore On Evidence, as follows:

> "The policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages.
>
> "The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

See 1 Wigmore on Evidence, § 57, p. 456.

We respectfully submit that all of the facts and circumstances relating to the alleged confession and/or declaration against interest indicate that all reference to the prior offense therein should have been excluded, and in the

event of failure to exclude reference thereto, the trial court should have instructed the jury in connection therewith. However, neither were done, and the failure to do both, we respectfully submit, constitutes prejudicial and reversible error.

A leading secondary authority states:

> Parts of a confession which have no reference to the issue upon the trial are not admissible under the rule that the accused is entitled to present the entire statement or conversation connected with a confession." 29 Am. Jur. 2d., Evidence, § 535, p. 587.

Your Honors will note that the Louisiana Supreme Court attempts to justify the admissibility of the reference to both the prior conviction and the episode involving the young woman in the French Quarter on the theory that both were contained in the alleged confession and/or declaration against interest. However, analysis of the alleged confession and/or declaration against interest will readily disclose that neither incident has any relation to the crime charged. Both occurred more than a year prior to the homicide herein. Therefore, both of the above matters should have been excluded under the ruling that parts of a confession which have no reference to the issue upon the trial are not admissible. To follow the theory of the State through to a logical conclusion, the mere fact that something was said by the accused in the alleged confession and/or declaration against interest would make that testimony admissible at the trial. As has been shown, this is clearly not correct. To admit this testimony is to do violence to the basic principles of fairness which permeate due process of law.

The entire concept of the blanket admission of any-

thing stated by the defendant in the course of a confession, regardless of relevancy, materiality, etc., clearly does violence to the concept of fair trial and due process. Your Honors will note that the Louisiana Supreme Court apparently rejects the rule cited and discussed at length hereinabove that in the event the defendant makes a statement with reference to another and separate offense during the course of a confession, such admissions are admissible only if they are "inseparably connected with the confession of the crime charged." In other words, where the confession of the crime charged also contains reference to an earlier offense, the reference to the earlier offense should be disregarded unless they are so inextricably interwoven with the details of the subsequent offense that they cannot be separated. Yet this is exactly what the Louisiana Supreme Court has refused to do in the instant case, with the result being that the defendant was clearly denied a fair trial.

Your Honors can examine the testimony of the officer from the Tucson police and it will be readily apparent at once that there was no need whatever to go into the prior offense. What purpose did it serve? It served no purpose whatever except to seek to convince the jury that the defendant is a bad man. The language referring to an incomplete offense could not have served any useful purpose whatever, except to prejudice the minds of the jurors herein —which it must have done.

During the course of oral argument in the Supreme Court of Louisiana, the Chief Justice made the statement to counsel for the defendant that in the event the District Attorney had sought to delete any reference to the prior offense, counsel for the defendant would have reserved a bill of exceptions under the provisions of LSA-R.S. 15:450, on the theory that the confession was not complete. Your Honors will note that the critical aspect of this criminal

case or any other criminal case is not whether the District Attorney will commit reversible error—the critical thing in this case or any other criminal case is whether the defendant has a fair trial. This is where we respectfully submit that the Court erred.

Your Honors will also note that the District Attorney changed his approach from the time he first sought to enter the alleged oral statement into evidence in the Trial Court, to the time that he subsequently sought to justify the admission of the oral statement into evidence in the Supreme Court of Louisiana. This change of approach clearly indicates that the prosecution was grasping for a basis of making the evidence admissible, and if the defendant's rights were affected, it didn't matter to the prosecution.

In the decision of *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), the United States Supreme Court stated:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

> The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The basic criticism of the rule generally permitting the admissibility of evidence of a prior offense within the confession and/or declaration against interest is that the accused has not taken the stand nor has he opened the door to any testimony relative to his good character. In other words, according to the theory presented by the Louisiana Supreme Court in the instant case, any statement made by the defendant during the course of the confession must be admitted into evidence. However, such an analysis literally ignores the basic purpose of refusing to admit evidence of prior offenses, i.e., the jury is then confronted with the issue as to whether the defendant is a person with a "bad general record who is being denied a fair opportunity to defend against a particular charge." The Louisiana Supreme Court would appear to be interested only in the contents of the confession and/or declaration against interest, regardless of what the accused may have said concerning the prior offense or anything else. We respectfully submit that this is where the Honorable Supreme Court of Louisiana erred. The confession and/or declaration against interest in the instant case could certainly have been introduced without reference to the prior separate offense committed by the accused and without reference to the prior alleged incomplete offense. The confession and/or declaration in the instant case did not refer to these admissions as being so inseparably connected with the confession of the crime charged. In other words, the relevant portions of the confession relating to the crime charged herein could have been readily separated from those parts of the confession relating to the other or earlier crime. This is not a case

where separation would have been impracticable; such separation could have clearly occurred without affecting the issue as to the confession relating to the instant offense charged herein.

We feel compelled to call Your Honors' attention to the fact that the reference to the prior offense was made by the District Attorney for Plaquemines Parish, Louisiana, in his opening statement, in the testimony of the police officer, and in the closing statement. The District Attorney for Plaquemines Parish here sought to obtain the benefit of any inference, innuendo, or connotation which could be attributable to the defendant's statement relative to the prior offenes, regardless of the remoteness of the offense, regardless of the fact that the offense was completely unrelated to the homicide herein in any manner whatever, and regardless of the fact that the confession and/or declaration against interest herein used could have come into evidence without any reference to the prior offense.

The alleged confession and/or declaration against interest herein is very analogous to the confession sought to be used by the prosecution in the case of *United States v. Jacangelo*, 281 F.2d 574 (3rd Cir., 1960), wherein one of the defendants in the course of a confession referred to a prior conviction of his co-defendant, and the Third Circuit Court of Appeal held that any reference to the prior conviction of the co-defendant was inadmissible and constituted reversible error. The Court stated:

> "Second, the evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. *Brown v. United States*, 3 Cir., 1936, 83 F. 2d 383; *Helton v. United States*, 5 Cir., 1955, 221 F. 2d 338. This was a far more serious matter than the technical objection to

the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information. *Marshall v. United States*, 1959, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250.

"Third, and in our view very significantly, it would have been a simple and effective procedure merely to delete from the confession before its submission to the jury the one sentence stating that Jacangelo was 'on probation' and 'on bail'. The continuity would not have been destroyed. The author's admission of his own wrongdoing and his narration of the essential facts of the alleged conspiracy would not have been distorted or changed in any significant way. There would simply have been a proper elimination of a prejudicial collateral disclosure about Jacangelo without any attendant interference with the intended and appropriate use of the confession."

Similarly, in *Marshall v. United States*, 360 U.S. 310, 79 S. Ct., 1171, 3 L. Ed. 2d 1250 (1959), this Honorable Court granted a defendant a new trial where a newspaper account of the trial was read by several jurors, and in the article read by the jurors was a reference to a prior conviction of the defendant. This Honorable Court ordered a new trial although jurors reading the article stated that they would not be influenced thereby, and the Trial Judge stated that he felt there was no prejudice to the defendant.

The constitutional rights of an accused in a criminal action have been regularly preserved and protected by this Court. We need not go any farther than the landmark decisions involving *Mapp*, *Gideon*, *Escobedo*, *Miranda*, and *Griffin*. In all of these decisions and in the other recent decisions emanating from this Honorable Court in the field of constitutional law and criminal procedure, the glaring

and the paramount feature is the right of an accused to fair play in the course of his trial. The basic premise of fair play underlying the decisions of this court similarly exist in the instant case. The basic issue as to fair play was specifically highlighted in the dissenting opinion in *Spencer*, wherein Mr. Chief Justice Warren stated, concurred in by Mr. Justice Fortas, as follows:

> "* * * **While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.** Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarcertation is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'" (Emphasis supplied)

In *Miranda v. State of Arizna*, 384 U.S. 436, 86 S. Ct. 1602 (1966), this Honorable Court states:

> "A recurrent argument made in these cases is that society's need for interrogation outweights the privilege. This argument is not unfamiliar to this

Court. See, e.g., *Chambers v. State of Florida*, 309 U.S. 227, 240-241, 60 S. Ct. 472, 478-479, 84 L. Ed. 716 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.' *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928) (dissenting opinion)."

As can readily be seen, the issue presented by Cardinale herein is a natural sequel to the decision of this Honorable Court in *Spencer*. How far does *Spencer* go? Does *Spencer* furnish any reason to believe that the basic concept of fair play in due process has been modified? Should *Spencer* be limited in its application to the recidivity statute, or will it go beyond those statutes to "hold that evidence of prior crimes introduced for no other purpose other than to show criminal disposition would violate the Due Process Clause?" The issue presented by the instant case is one wherein this

Honorable Court can answer these and a number of other questions with reference to the concept of testimony relative to prior offenses, admissibility of statements relative to prior offenses within the body of a confession and/or declaration against interest, and other points requiring elaboration and elucidation.

We respectfully submit that the issues presented herein are worthy of Your Honors' attention and consideration. In the field of administration of criminal justice the likelihood of a defendant being prejudiced because of an unfair admission into evidence concerning a prior offense is too great to be ignored. Both *Michelson* and *Spencer* indicate that the procedure followed herein by the District Attorney for the Parish of Plaquemines was clearly unconstitutional. We therefore respectfully submit that the writ of certiorari requested herein should be granted for the purpose of reviewing the matter.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari directed to the Honorable Judges of the Supreme Court of Louisiana, commanding them to send to this Court the necessary certified copies of the proceedings entitled "*State of Louisiana vs. Philip J. Cardinale, Jr.*", Docket No. 48,769 on the Docket of said Court and lately pending therein, to the end that their validity may be ascertained, and that after due proceedings, a writ of certiorari issue herein, to the end that the validity of said proceedings may be ascertained.

Petitioner further prays for all necessary writs and orders and decrees in the premises, and for all general and equitable relief.

NATHAN GREENBERG,
848 Second Street,
Gretna, Louisiana,
Attorney for Petitioner.

CERTIFICATE

I hereby certify that a copy of the above and foregoing application for a writ of certiorari has been mailed to the following counsel of record herein by postage prepaid:

1. Hon. Jack P. F. Gremillion
   Attorney General
   State of Louisiana
   State Capitol
   Baton Rouge, Louisiana.

2. Hon. Leander Perez, Jr.
   District Attorney
   Parish of Plaquemines
   Pointe a la Hache, Louisiana.

3. Hon. Preston Hufft
   Assistant District Attorney
   Parish of Plaquemines
   Pointe a la Hache, Louisiana.

APPENDIX

SUPREME COURT OF LOUISIANA

No. 48,769

STATE OF LOUISIANA

versus

PHILIP CARDINALE, JR.

Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana; Honorable Morris G. Becnel, Judge.

HAMITER, Justice.

Philip Cardinale, Jr. was charged in an indictment with having murdered, on or about August 10, 1965, one Mary Agnes Buford. Following a trial by a jury, which resulted in a verdict of guilty, he was sentenced to death. On this appeal he relies on fourteen bills of exceptions to obtain a reversal of his conviction and sentence.

Bill No. 1 was reserved to the court's refusal to order the state, as requested in defendant's prayer for oyer, to produce "All statements obtained by the prosecution from any and all witnesses or other third persons in connection with the prosecution of the defendant herein."

There is no merit in the bill. In *State v. Haddad*, 221 La. 337, 59 So. 2d 411, we said: "It is now so firmly established in our jurisprudence that a defendant in a criminal case is not entitled to a pre-trial inspection of written confessions of co-defendants, written statements of witnesses, or police reports in the hands of the sheriff, the police department, or the district attorney that we fail to understand why defense counsel continue to present such arguments to us on appeal. *State v. Lee*, 173 La. 966, 139 So.

302; *State v. Dallao*, 187 La. 392, 175 So. 4; *State v. Williams*, 211 La. 782, 30 So. 2d 834; *State v. Mattio*, 212 La. 284, 31 So. 2d 801; *State v. Simpson, supra.* * * *" See also *State v. Cleveland and Morris Johnson*, 249 La. 950, 192 So. 2d 135.

Bill of exceptions Nos. 2 and 6 involve the same subject matter and were taken under the following circumstances: On August 12, 1965, or two days after the murder (by bludgeoning of the victim), a search warrant was obtained by law enforcement officers authorizing the search of a described Dodge automobile at a given address, this for the purpose of seizing "Sharp metal object or objects, axe, large knife, piece of metal used as a club hammer, hatchet or hatchets, human Hair, Human Blood, female clothing, shoes, ladys purse." Prior to the trial the defendant moved to suppress some of the evidence seized by means of the warrant, and he reserved bill No. 2 to the court's overruling such motion. Bill No. 6 was taken during the trial when the court denied defendant's objection to the introduction of human hair and blood found in the trunk of the searched vehicle. (Two other search warrants obtained at the same time authorized search for the identical articles in a building and a shed located at the mentioned address. However, evidence taken in connection with the motion to suppress revealed that the searches made under these warrants produced nothing for the state to use in the prosecution. Consequently, the court's overruling the motion to suppress as to them was not prejudicial and is immaterial here.)

The accused concedes that the warrant is in proper form and was issued on probable cause. (We have examined the application for the warrant, but in view of defendant's concession it is unnecessary to discuss in detail the fact of

the issuance thereof.) The sole basis for urging the alleged invalidity of the warrant, and the impropriety of introducing the evidence obtained through its use, is that such was directed against the obtaining of items purely "evidentiary" in nature and, therefore, not subject to seizures and subsequent use in the prosecution of the cause.

In connection with these bills the defendant contends that the provisions of LRS 15:42 and 43 (1928 Code of Criminal Procedure) do not include "evidentiary" things as among those which might be the subject of a search warrant; and that, because these sections limit the objects for which a search can be made, the warrant herein authorizing a search for the items sought was improper and illegal. However, LRS 15:41 (1928 Code of Criminal Procedure), which must be read in connection with the two succeeding sections, grants to the courts unlimited authority to issue search warrants. And the authority therein granted is circumscribed, we think, only by the provisions of Article I, Section 7 of the Louisiana Constitution which provides that no search or seizure shall be made except upon warrant issued upon "probable cause" (such probable cause usually being a showing of a nexus between the object sought and the commission of a known or suspected crime).

The mentioned Sections 42 and 43 do not, in our opinion, constitute a limitation of that authority; rather, they provide additional instances where a warrant might issue. Thus, Section 42 permits the obtaining of possession of stolen property and Section 43 authorizes seizure of property which, by nature, is contraband and to which, therefore, the state has the right of possession without there necessarily having been a crime committed.

The defendant additionally contends that the search and seizure, as well as the subsequent use in the prosecu-

tion of the defendant, of the purely evidentiary items violated his rights provided for in Article IV and V of the Federal Constitution. He relies on *Gouled v. United States*, 225 U.S. 298, 65 L. Ed. 647, as approved in *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877.

Conceding, arguendo, that some of the broad language used in the *Gouled* opinion might furnish some support to defendant's contention, the effect of that opinion has been specifically limited in the more recent case of *Warden v. Hayden*, ___ U.S. ___, 18 L. Ed. 2d. 782. In the latter the court approved the seizure of wearing apparel of the accused and the introduction thereof into evidence. In so doing it observed: "We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are 'mere evidence.' The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. The Court of Appeals, however, felt 'obligated to adhere to it.' 363 F. 2d. at 655. We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment."

The court then pointed out that the only proper application of *Gouled* would be in cases where the items seized were private papers, writings, or documents of the suspect to the extent that their involuntary seizure and use as evidence against him "would be, in effect, as ruled in the *Boyd* case, to compel the defendant to become a witness against himself." And the court concluded: "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not

compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d. 908, 86 S. Ct. 1826. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

Even less "testimonial", or "communicative" in nature, were the objects seized and introduced into evidence in the instant case, they consisting of the hair and blood of the victim, and not the property of defendant at all.

We find no error, therefore, in the court's overruling the motion to suppress (bill No. 2) and allowing the evidence obtained through use of the warrant to go to the jury (bill No. 6).

Bill of exceptions No. 4 is leveled at the failure of the Clerk of Court to read the indictment, as well as the plea of not guilty of the defendant, to the jury prior to the commencement of the taking of testimony, as is provided in LRS 15:333 (1928 Code of Criminal Procedure). *State v. Ducre*, 173 La. 438, 137 So. 745 is cited as authority to support the defendant's contention that such failure constituted reversible error.

In view of the holding of this court in *State v. Leslie*, 244 La. 921, 155 So. 2d 19 we are of the opinion that this bill is without substance. The record reflects that initially herein the clerk did, inadvertently, omit the reading of the indictment and the plea of not guilty of the defendant to the jury. However, while the state's first witness was testifying the court itself took cognizance of such omission. And at that time it interrupted the proceedings and ordered that the indictment and the plea of the accused be then read. This was done. Incidentally, counsel for the

accused offered no objection to the omission as an initial step in the trial.

In *State v. Leslie, supra,* under similar circumstances, we said: "The reading of the plea to the jury, like the opening statement of the district attorney which follows it in statutory sequence, is mandatory. This means that **when timely objection is made to its omission,** the failure of the trial judge to require that the plea be read is error. See *State v. Gayton,* 221 La. 1115, 61 So. 2d 890 and *State v. Ducre,* 173 La. 438, 137 So. 745.

"In the instant case, however, the defense made no objection at the time of the omission. The trial proceeded. The district attorney made his opening statement. Defense counsel waived an opening statement. The district attorney commenced the introduction of evidence. The testimony of two witnesses had been adduced by the state, when objection was raised for the first time. Thereupon, the court required the plea to be read to the jury and overruled the objection. Under these circumstances, we are of the opinion that the right of the defendant to have the plea read in proper sequence was waived.

"* * * * * * * * * * *

"The defendant relies principally upon *State v. Ducre, supra,* wherein the Court held that the refusal of the trial judge to order the district attorney to make an opening statement as required by Article 333 of the Code of Criminal Procedure (now LSA-R.S. 15:333) was reversible error. In that case, unlike the present one, the defendant made prompt request of the court for the ruling prior to the introduction of evidence. The case was thus distinguished in *State v. Shearer,* to which reference has been made." (Emphasis ours)

Bill of exceptions No. 5 was reserved to the court's permitting Jim Hoffman, who had been qualified by the state as an expert in photography (preparatory to introducing certain photographs), to testify with regard to a sketch he had made of the scene of the crime. The defense contends that the qualification of the witness in the field of photography did not permit his giving testimony with a plat prepared by him.

It was established that the digram had been drawn by the witness according to the things he had actually seen while he was at the locale. As the trial court observed, when it overruled the objection, "It is within the realm of his own knowledge" to prepare and testify from the sketch. Consequently, no expert qualifications were required for such testimony.

We perceive no error in the court's ruling.

Bills of exceptions Nos. 7 and 9 were taken to the introduction of an inculpatory statement (or confession) of the accused made to law enforcement officers of Tucson, Arizona. There is no contention whatsoever that the statement was not completely voluntary, and the evidence itself shows quite the contrary. **The accused voluntarily sought out and surrendered himself to the Tucson police officers,** who at such time had no knowledge of the instant crime or that the defendant was wanted as a fugitive; he told them he was probably wanted in Louisiana in connection with the crime; and, after being advised of his right to counsel, **he freely recited the facts to which the officers from Tucson testified.**

In view of these circumstances, which are not disputed, the guidelines set down in *Escobedo v. Illinois*, 378 U.S. 490, 12 L. Ed. 2d. 977, are not applicable. See also

State v. Cleveland and Morris Johnson, supra, and *State v. Aherns,* 250 La. 391, 196 So. 2d 250.

The sole basis for the objection to the statement is that the accused was not offered the services of an attorney as required by the decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d. 694. But inasmuch as the trial of this defendant commenced on May 2, 1966, prior to the effective date of the *Miranda* case (which was June 13, 1966), the decision therein is not applicable. See *Johnson v. State of New Jersey,* 384 U.S. 719, 16 L. Ed. 2d. 882; *State v. Evans,* 249 La. 861, 192 So. 2d 103; *State v. Gregoire,* 249 La. 890, 192 So. 2d 114; *State v. Cleveland and Morris Johnson, supra,* and *State v. Aherns, supra.*

Moreover, the circumstances recited above of the giving of the statement in the instant case, we think, take it out of the rule laid down in *Miranda.* Therein the United States Supreme Court prefaced its holding by pointing out that its guidelines were to apply to statements "stemming from custodial interrogation" of the defendant, and that "By custodial interrogation, we mean **questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action** * * *." And it concluded its discussion with the following observation: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. **There is no requirement that police stop a person who enters a police**

station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (Emphasis ours)

The objection to the introduction of the inculpatory statement was, therefore, groundless.

Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.

We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.

The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." And we held: "The confession is not rendered

inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution."

The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34.

On cross examination of one of the state's witnesses (Deputy Ernest Amos) defense counsel attempted to elicit from him whether the defendant had ever denied committing the crime. The state's objection to the question was sustained and bill of exceptions No. 8 was reserved. We find no error in the ruling.

The cases cited by defendant do not support his contention that the action constituted reversible error. In fact, their holdings are to the contrary. Thus, in *State v. Johnson*, 35 La. Ann. 968, the court held that certain self-serving statements of an accused were properly excluded and observed: "* * * The rule is undoubted that, when confessions or statements of an accused are offered, they must go in all together; but that only applies to declarations made at one time or having some connection with each other.

"Here we find no connection whatever between the admitted confessions and the rejected declarations, the former having been made six weeks after the latter. Manifestly, the prior self-serving declarations could not weaken the effect of the latter self-incriminating ones. The former are rejected as unworthy of reliance, because springing, presumably, from self-interest; the latter are received for precisely the converse reason." To the same effect are *State v. Gunter, 30 La. Ann. 536* and *State v. Rutledge*, 37 La. Ann. 378.

It is not contended here that the self-serving declarations about which the witness was questioned were made in connection with any confession or inculpatory statement, and, particularly, there appears no confession made in the presence of this witness. Moreover, the witness stated unequivocally that he had no recollection of any conversations he might have had with the defendant.

Bill of exceptions No. 11 was taken to the court's accepting the witness Milton Cox, over defendant's objection, as an expert "criminalist"—one versed in the skills and techniques involved in laboratory crime detection—to lay the foundation for his testimony connecting blood, hairs, etc. found in the defendant's automobile with that of the deceased, and also showing that shoes found in the possession of defendant contained soil the same or similar to that where deceased's body was found.

The record shows that the trial judge was satisfied as to the witness' qualification. In *State v. Stahl*, 236 La. 362, 107 So. 2d 670 we observed: "* * * The rule is well settled that whether a witness is entitled to be heard in the capacity of expert is within the trial judge's province to decide, and his ruling will not be disturbed where no error appears. * * *"

We have examined the evidence relating to Cox's qualification in the stated field and find that his formal education as well as his practical experience in this area fully justified the court's acceptance of him as an expert. There is, therefore, no merit in the bill.

Bill of exceptions No. 12 was reserved to the testimony of Cox that certain shoes exhibited to him appeared to have been recently washed, it being argued that he had not been qualified as an expert to express an opinion on such matters. We conclude that the court was correct in its observation that the objection was not well grounded for the reason that no special qualifications were required to answer the question and that "anyone of a number of individuals in this court room could perceive and observe that a piece of leather has been soaked and wet and is moist." The bill is without substance.

While the witness was testifying regarding a hatchet which, as had been established by other witnesses, had been taken from the defendant's abandoned truck, he stated that he had found no evidence of blood on the hatchet. Originally he had said that he did not have the hatchet with him. Later he stated that he was in error and that he did have it. When the prosecuting attorney asked to see it defense counsel objected, urging that it was irrelevant since there were no blood stains found on it and that he had not had an opportunity to cross examine the witness about the hatchet because he had said he did not have it. On completion of the state's questioning of the witness, defense counsel was permitted to cross examine him at length about his negative findings with regard to the hatchet. When the state offered to introduce the hatchet into evidence the defendant objected. The court observed (in effect), in ruling on the objection, that out of an abundance of precaution he would

sustain the objection. Whereupon defense counsel moved for a mistrial because the hatchet "has been exhibited to the jury and it is prejudicial and *de*famatory" (inflamatory). Bill of exceptions No. 13 was reserved to the court's overruling the motion for a mistrial.

We find no merit in the bill. First of all we note that, without taking a bill in connection with his original objection or reserving his rights thereunder, defense counsel himself questioned the witness concerning the hatchet. Moreover, it had been shown that the victim had suffered severe fractures and lacerations of the head and upper portion of the body, caused by a fairly sharp and rather heavy object such as a cleaver or hatchet. It had also been shown that the hatchet referred to by the witness had been found in defendant's truck in his presence and to which he had voluntarily directed police officers. Under these circumstances it appears to us that his ownership and possession of such an instrument was relevant, even though no blood stains were found on it. The result of Cox's testimony would not render the introduction less revelant, but would only lessen the probative effect of its having been in defendant's possession, redounding to his benefit rather than to his prejudice. Besides, inasmuch as the court did not permit the hatchet to go to the jury, we do not perceive how merely viewing an ordinary hatchet during the examination of the witness could have caused such alleged inflamatory and prejudicial results in he minds of the jury.

Bill of exceptions No. 14 is directed to the fact that the jury deliberated only one and one-half hours before returning their verdict of guilty. Defendant urges that the short time taken "clearly indicates a lack of serious deliberation upon a matter so serious as the life or death of the accused, and for this factor alone [this bill] should be the basis of a mistrial."

We know of no law requiring any specific time for jury deliberations. Nor can we presume prejudice merely from their reaching an early verdict. Defense counsel says in his brief that the state presented its evidence for two and one-half or three days. The trial judge has not favored us with a per curiam to this bill, but the entire record has been sent to this court and we note that the defense offered no rebuttal evidence whatsoever. In such circumstances we cannot, without a more positive showing, say that the jury erred in its deliberations. The bill is without merit.

Before closing this opinion we feel compelled to note the lack of per curiams by the trial judge. In no instance has he prepared one. Rather, he filed what he terms a "general per curiam" wherein he refers to the pages of the entire transcript (three volumes) that relate to the proceedings during which the respective bills were reserved. While such procedure may, as suggested by the judge, provide a "simple and expedient method" of presenting his views, we do not deem it a satisfactory method of presentation for our appellate review.

For the reasons assigned the conviction and sentence are affirmed.

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No. 76

In the Supreme Court of the United States

STATE OF LOUISIANA,

Respondent,

VERSUS

PHILIP CARDINALE, JR.,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

JACK P. F. GREMILLION,
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No.____

In the Supreme Court of the United States

STATE OF LOUISIANA,

Respondent,

VERSUS

PHILIP CARDINALE, JR.,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Philip Cardinale, Jr. was charged in an indictment with having murdered one Mary Agnes Buford. Following a trial by jury he was sentenced to death. An appeal was lodged with the Supreme Court of the State of Louisiana and by a decree dated January 15, 1968 the conviction was upheld. On February 19, 1968 the State Supreme Court denied the application for a rehearing and the defendant filed this application for a Writ of Certiorari.

ISSUES

The petition for a Writ is based on the use in the trial of the entire confession which the defendant gave to police officers in Tuscon, Arizona, to which state he had fled after the commission of the crime. While walking on the streets of Tuscon, the defendant flagged a police car and asked to be taken in. Before conversing with him both police officers warned him that he

did not have to say anything; that anything he said could be used against him and that he had the right to contact an attorney. The conversation with the defendant was informal and under no duress, pressure, threats or promises whatsoever—the defendant was eager and anxious to converse so as to get it off his chest. He was talking to police officers who, at the time of commencing the conversation, did not even know what if any charges were pending against the defendant in the State of Louisiana.

No question has ever been raised at any stage of the proceedings as to the voluntary nature of the confession but objection was made originally to the fact that the defendant was not offered the services of an attorney. The State Supreme Court rightfully disposed of this issue in the following language:

> "Bills of exceptions Nos. 7 and 9 were taken to the introduction of an inculpatory statement (or confession) of the accused made to law enforcement officers of Tuscon, Arizona. There is no contention whatsoever that the statement was not completely voluntary, and the evidence itself shows quite the contrary. *The accused voluntarily sought out and surrendered himself to the Tuscon police officers,* who at such time had no knowledge of the instant crime or that the defendant was wanted as a fugitive; he told them he was probably wanted in Louisiana in connection with the crime; and, after being advised of his right of counsel, *he freely recited the facts to which the officers from Tuscon testified.*

In view of these circumstances, which are not

disputed, the guidelines set down in *Escobedo v. Illinois*, 378 U.S. 490, L2L. Ed. 2d. 977, are not applicable. See also *State v. Cleveland and Morris Johnson, supra*, and *State v. Aherns*, 250 La. 391, 196 So. 2d. 250.

The sole basis for the objection to the statement is that the accused was not *offered* the services of an attorney as required by the decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2D. 694. But inasmuch as the trial of this defendant commenced on May 2, 1966, prior to the effective date of the Miranda case (which was June 13, 1966), the decision therin is not applicable. See *Johnson v. State of New Jersey*, 384 U.S. 719, 16L. Ed. 2D. 882, *State v. Evans*, 249 La. 861, 192 So. 2d. 103, *State v. Gregoire*, 249 La. 890, 192 So. 2d. 114, *State v. Cleveland and Morris Johnson, supra* and *State v. Aherns, supra.*

Moreover, the circumstances recited above of the giving of the statement in the instant case, we think, take it out of the rule laid down in Miranda. Therein the United States Supreme Court prefaced its holding by pointing out that its guidelines were to apply to statements "stemming from custodial interrogation" of the defendant, and that "By custodial interrogations, we mean *questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action* * * *." And it concluded its discussion with the following observation: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any

compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. *There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" (Underscoring theirs)

State v. Cardinale, 251 La 827, 206 So (2d) 510 (1968) Page 839,840,841.

This issue has been abandoned by the defendant and he relies in his application for a writ solely on the basis of the admissibility of the entire confession. When the police officer from Tuscon, Arizona took the stand he testified as to the entire confession received from the defendant. Included in the confession was statements by the defendant that he had been convicted several months before of a crime involving a girl, that he was sentenced to 90 days imprisonment in the Parish jail, that he did his time in 45 days and that upon being released from jail he had secured a gun and had spent 3 or 4 nights looking for the girl to kill her.

The defendant objected to the testimony of the police officer relative to the previous offense and the incomplete offense of seeking out the prosecutrix to kill her but the Trial Judge overruled the objection and

the entire confession was introduced in evidence. In arriving at his decision the Trial Judge relied on the Louisiana Revised Statutes—Title 15: Section 450 which provides as follows:

> LOUISIANA REVISED STATUTES—TITLE 15: SECTION 450 "USE OF CONFESSION, ADMISSION OR DECLARATION IN ENTIRETY"
>
> Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

In its decision the Louisiana Supreme Court upheld the lower court in the following language:

> "Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tuscon police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made refernece to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.
>
> We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's

statement outlining to the officers his participation in the instant crime.

The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d. 473. Therein we referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." And we held: "The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of hereoin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution."

The Maney holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d. 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d. 34.

State v. Cardinale, 251 La. 827, 296 So. (2d) 510 (1968) Page 842, 843.

Defendant's petition for a writ in effect contends that the provisions of LRS 15: 450 are unconstitutional in that they violate the Fourteenth Amendment. In support of this he relies on the dissenting opinion in *Spencer v. State of Texas*, 385 U.S. 560, 87 S. Ct. 648 (1967). However a review of the majority opinion in the *Spencer* case fails to disclose any basis whatsoever for declaring LRS 15:450 to be violative of the constitution. In *Spencer* this Court upheld the recidivist statute of the State of Texas. The following language in *Spencer* is most applicable to the matter presently before the Court:

> "and held that his Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-standing practice at issue. A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L.Ed. 629, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts." Page 653
>
> * * *
>
> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749; *Betts v. Brady*, 316 U.S. 455, 625 Ct. 1252, 86 L. Ed. 1595; cf. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2D. 799; see *Estes v. State of*

Texas, 381 U.S. 532, 85 S.Ct. 1628, 14L. Ed. 2d 543; *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed 2D 600; cf. *Griffin v. People of State of Illinois* 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. *But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.*" * * * As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 545 Ct. 330, 332, 78L Ed. 674. See also *Bachalter v. People of State of New York*, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492. Pages 653, 654 (Emphasis ours).

Further commenting on its inability to consider the matter before it in the Spencer case in a legislative or rule-making context, this Court had the following to say:

> "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustified encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution which these rules are not." Page 656

The foregoing clear and strong language cannot

in any way be construed in support of defendant's contention in the matter.

The defendant would have this Court take unto itself the legislative and rule-making power by rewriting the provisions of LRS 15:450 to suit what the defendant believes the statute should contain. In emphatic language in the *Spencer* case this Court has declared that it will take no such powers unto itself.

LRS 15:450 has been on the statute books of the State of Louisiana for over 40 years and has consistently been followed by the jurisprudence in this State. An examination of the very wording of the statute—the entire confession must be admitted so that the defendant may be afforded the benefit of any exculpation or explanation that the whole statement may afford—can lead to no other conclusion but that this statute falls clearly within the fairness provisions of the Fourteenth Amendment. This rule applies to every confession and no prosecutor is granted the opportunity to determine what parts of a confession he will or will not present for the consideration of the jury. He is bound by this rule to present the entire confession and the jury will have the opportunity to examine and give full weight and consideration to the entire comments of the defendant including any exculpation and explanation that may be contained therein. Through such a system the defendant is assured that the jury will receive his confession in the same way in which it was given by him. This statute is a rule of evidence in the Louisiana judicial system, has been for

many years and plays an important role in the fair conduct of all trials.

It is submitted that LRS 15:450 is not violative of the Fourteenth Amendment and the decisions of the Lower Court and the State Supreme Court applying the provisions of LRS 15:450 should be upheld.

The defendant in his petition makes note also of the argument which was advanced in the Louisiana Courts by the District Attorney that the reference to the prior conviction for a crime against a girl and the subsequent search for her upon being released from jail with the avowed purpose of killing her would also have been admissible under the provisions of LRS 15:445 and 446. This is certainly true and it is the position of the State that even without the provisions of LRS 15:450 or if these incidents were not the subject of a confession they would have been admissible to show intent as intent was a necessary ingredient of the crime that the accused stood charged of: Murder under LRS 14:30. LRS 15:445 and 446 provide as follows:

> SECTION 445 INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED
>
> In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."
>
> SECTION 446 EVIDENCE WHERE KNOWL-

EDGE OR INTENT IS MATERIAL AND WHERE OFFENSE IS ONE OF A SYSTEM

When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

In support of this we find the following:

"Evidence of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent, which is necessary to constitute the crime charged. Any fact which proves or tends to disprove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime.

This court has recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed." *State v. Cupit*, 189 La. 509, 179 So. 837, 838 (1938).

To the same effect we find the following in *State v. Evans* 249 La 861, 192 So (2d) 103 (1966):

"These bills were taken to the Court's permitting two witnesses, Glenda Dale Jenkins and Clyde Coombs, to testify as to the commission by these defendants of a prior armed robbery of

another bus operator at a location in the vicinity of the instant shooting, and to *their attempted* armed robberies of several places of business in the general locale of defendant's residences.

"Generally evidence of other crimes, even those similar in nature, is not admissible to prove the offense charged. However, there are well recognized exceptions to this rule, one being that such evidence is admissible to prove intent when it is a necessary ingredient of the crime charged." Page 106

See also *State v. Johnson*, 228 La. 317, 82 So (2d) 24 (1955) and *State v. Morris*, 245 La 475, 157 So (2d) 728 (1963). In the Morris Case the Court held that on the trial of the defendant for Murder under 14:30 it was admissible for a police officer to testify that the defendant some years before had pleaded guilty without capital punishment to killing another person. This testimony was admissible because intent was a necessary ingredient of the crime of murder.

The State Supreme Court did not go into the second point raised above as a confession was involved and the matter was controlled by LRS 14:450. There was no necessity to discuss other aspects of the admissibility of such evidence.

It is respectfully submitted that this application for Writ of Certiorari be denied as the holding of the State Supreme Court that the entire confession must be introduced in evidence under LRS 15:450 is not violative of the Fourteenth Amendment and is in keep-

ing with the reasoning of this Court in the *Spencer* case.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

LEANDER H. PEREZ, JR.,
District Attorney.

PRESTON H. HUFFT,
Special Counsel to District Attorney.

CERTIFICATE

I, William P. Schuler, a member of the bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing opposition to petition for writ of certiorari has been mailed to counsel of record, Nathan Greenberg, Esq., 848 Second Street, Gretna, Louisiana by postage prepaid.

William P. Schuler

B-1635, 11-68

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 76

PHILIP CARDINALE, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

BRIEF FOR PETITIONER

~~PETITION FOR WRIT OF CERTIORARI~~
TO THE SUPREME COURT OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1968

No. 76

PHILIP CARDINALE, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The instant application for a writ of certiorari or review was filed herein by Philip J. Cardinale, Jr., petitioner, following his conviction of murder in the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana, wherein he was sentenced to death. The application for a writ of certiorari or review stemmed from the decree of the Supreme Court of Louisiana handed down on January 15, 1968, which affirmed petitioner's conviction. An application for re-hearing was filed timely, and on February 19, 1968, the application for re-hearing was denied. The instant application for a writ of certiorari or review was filed on May 6, 1968, and the writ of certiorari was granted on November 25, 1968.

LOWER COURT OPINIONS

The opinion of the Supreme Court of Louisiana in the instant case is found at 251 La. 827, 206 So.2d 510. The decree of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines is unreported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, U. S. Code, Section 1257, seeking to review the judgment of the Supreme Court of Louisiana handed down on January 15, 1968. An application for re-hearing was timely filed, and on February 19, 1968, the said application for re-hearing was denied. The denial of the application for re-hearing was entered on February 19, 1968. The instant application for a writ of certiorari was filed on May 6, 1968. The writ of certiorari was granted on November 25, 1968.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Louisiana statutes involved are as follows:

(1) LSA-R.S. 15:450, which provides:

"Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

(2) LSA-R.S. 15:495, which provides:

"Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

(3) LSA-R.S. 15:445, which provides:

"In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

(4) LSA-R.S. 15:446, which provided:

"When knowledge of intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of

similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged."

The Constitutional provisions involved are as follows:

Amendment XIV, U. S. Constitution, which provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

(a) Whether the use of a prior conviction to show nothing more than a disposition to commit crime would violate the due process clause of the Fourteenth Amendment.

(b) Whether the procedure used herein in bringing out all of the facts and circumstances of the alleged confession and/or declaration against interest containing reference to the alleged prior offense was unconstitutional

and violated the due process clause of the Fourteenth Amendment.

(c) Whether the four state statutes involved quoted hereinabove at length, i.e., LSA-R.S. 15:445, 446, 450, and 495, are unconstitutional, or whether the procedure used thereunder by the District Attorney for the Parish of Plaquemines to get the evidence in question before the jury was unconstitutional.

STATEMENT OF THE CASE

The issues in the instant case concern the constitutionality of the procedure used herein in the trial court to convict the petitioner of murder. In the instant action, homicide was allegedly committed on August 10, 1965, and thereafter the petitioner turned himself in to the police authorities in Tucson, Arizona. During the course of his custodial interrogation in Tucson, Arizona, he referred to a prior conviction occurring in Louisiana, which prior conviction was for a crime against nature occurring on July 12, 1963, and causing the petitioner to be sentenced to serve three months in the Parish Prison on March 25, 1964 (T. 126, 467). Petitioner further stated during the course of his custodial interrogation that after he served his time in the Orleans Parish Prison, he went looking for his alleged prosecutrix with a gun for the stated purpose of killing her; however, he never did find her, and, therefore no further offense was committed (T. 496-510).

In the opening statement of the District Attorney for the Parish of Plaquemines, Louisiana, he referred to the alleged oral confession and particularly the alleged reference to the alleged prior offense. During the course of the interrogation by an officer from Tucson, Arizona, defendant was interrogated at length about the prior offense and the episode involving going looking for the woman with a gun. In the closing argument, the District Attorney again emphasized the prior offense and the subsequent episode relating to looking for the woman. Timely objection to this testimony and the reference thereto in the opening and closing statement was made by the defense, and bills of exception were reserved, without avail. In commenting upon the issue raised herein, the Louisiana Supreme Court stated:

> "Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.

"We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.

"The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928) Code of Criminal Procedure) which provided: 'Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.' And we held: 'The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the

statement did contain other inculpatory facts which were relevant to this prosecution.'

"The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34."

The issue presented by the instant application for a writ of certiorari or review has been crystallized in the recent dissenting opinion of Mr. Chief Justice Warren and concurred in by Mr. Justice Fortas in the decision of *Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967), the recidivist decision, wherein the issue presented by the instant case is highlighted as follows:

"* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to this guilt of the crime currently charged. Of course

> it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.' "

ARGUMENT

Under the theory advanced by the Louisiana Supreme Court in the instant case, any time an accused makes a statement while he is being interrogated, that statement is admissible in evidence against him, regardless of the relevancy thereof. The tenor of the *Cardinale* case is quoted from the language of the Supreme Court decision hereinabove, and this confirms the statements by the Supreme Court of Louisiana made by that court to counsel for defendant during the course of oral argument. However, the tenor of the *Cardinale* decision and the blanket statement to the effect that anything stated by defendant while he is in the course of a confession and/or declaration against interest is admissible, is clearly contra to the spirit and basis of fairness to the defendant in obtaining a fair trial. The rule stated in a leading secondary authority is as follows:

> "A confession is not rendered ipso facto inadmissible by the declarant's unrelated and separate offense. In proving an admissible con-

fession, the prosecution may introduce parts of the statement which show or indicate that the accused has committed other and separate offenses, where such admissions are inseparably connected with the confession of the crime charged. However, where the relevant parts dealing with the crime charged can be readily separated from those parts confessing to other crimes, most courts have required this to be done, although where such separation is impracticable the courts have almost uniformly held that a cautionary instruction to the jury will suffice. The determination of what is reasonably separable in this respect is usually left to the sound discretion of the trial court." Evidence, 29 Am. Jur. 2d. § 536, p. 587.

Among the decisions throughout the country following the preferable rule are *People v. Loomis,* 178 N.Y. 400, 70 N.F. 919 (1904); *State v. Skaug,* 161 P.2d 708 (Nev. 1945); *State v. Fowler,* 230 N.C. 470, 53 S.E.2d 853 (1949); *State v. Nagy,* 27 N.J. Super 1, 98 A.2d 613 (1953), and *State v. Myrick,* 181 Kan. 1056, 317 P.2d 485 (1957), all of which hold that where part of the confession relates to other offenses and that portion relating to the other offenses is separable, the reference to the other offense must be excluded. Your Honors will note that the so-called confession, and/or declaration against interest in the *Cardinale* case contained reference to another offense as well as to the alleged incident concerning the looking for the woman in the French Quarter with a gun, both of which were clearly separable from the alleged confession relating to the

crime charged in the instant case. However, Your Honors will note that there was no attempt to separate one from the other, nor was there any attempt by the Trial Court to instruct the jury in connection with either the prior offense or the incompleted offense relating to the looking for the girl in the French Quarter with a gun. We respectfully submit that this was error on the part of the Trial Court which was perpetuated by the Supreme Court of Louisiana on different grounds.

Your Honors will note that the basis of the complaint relative to these declarations by the defendant is two-fold: (1) That the alleged oral confession contained reference to a prior offense where the defendant had not taken the stand, had not offered any evidence relative to his good character, nor had there been any basis for impeachment of the defendant's character, see LSA-R.S. 15:495; and (2) that the alleged incident concerning the looking for the woman in the French Quarter with a gun was an incomplete offense, and not a completed one; and that any reference thereto could only have been for the purpose of bias or prejudice. *Cf. State v. Rives*, 193 La. 186, 190 So. 374 (1939). We respectfully submit that the blanket admission of the entirety of the alleged oral confession without any attempt to separate these portions from the portion relating to the instant crime in question was prejudicial error and denied to defendant a fair trial.

Your Honors are well aware of the rule prohibiting the State from going into any other crime besides the crime with which the accused is charged. The basis of

the rule is succinctly stated in Wigmore On Evidence, as follows:

> "The policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom — the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages.
>
> "The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

See 1 Wigmore on Evidence, § 57, p. 456.

We respectfully submit that all of the facts and circumstances relating to the alleged confession and/or declaration against interest indicate that all reference to the prior offense therein should have been excluded, and in the event of failure to exclude reference thereto,

the trial court should have instructed the jury in connection therewith. However, neither were done, and the failure to do both, we respectfully submit, constitutes prejudicial and reversible error.

A leading secondary authority states:

> Parts of a confession which have no reference to the issue upon the trial are not admissible under the rule that the accused is entitled to present the entire statement or conversation connected with a confession." 29 Am. Jur. 2d., Evidence, § 535, p. 587.

Your Honors will note that the Louisiana Supreme Court attempts to justify the admissibility of the reference to both the prior conviction and the episode involving the young woman in the French Quarter on the theory that both were contained in the alleged confession and/or declaration against interest. However, analysis of the alleged confession and/or declaration against interest will readily disclose that neither incident has any relation to the crime charged. Both occurred more than a year prior to the homicide herein. Therefore, both of the above matters should have been excluded under the ruling that parts of a confession which have no reference to the issue upon the trial are not admissible. To follow the theory of the State through to a logical conclusion, the mere fact that something was said by the accused in the alleged confession and/or declaration against interest would make that testimony admissible at the trial. As has been shown, this is clearly not correct. To admit this testimony is to do

violence to the basic principles of fairness which permeate due process of law.

The entire concept of the blanket admission of anything stated by the defendant in the course of a confession, regardless of relevancy, materiality, etc., clearly does violence to the concept of fair trial and due process. Your Honors will note that the Louisiana Supreme Court apparently rejects the rule cited and discussed at length hereinabove that in the event the defendant makes a statement with reference to another and separate offense during the course of a confession, such admissions are admissible only if they are "inseparably connected with the confession of the crime charged." In other words, where the confession of the crime charged also contains reference to an earlier offense, the reference to the earlier offense should be disregarded unless they are so inextricably interwoven with the details of the subsequent offense that they cannot be separated. Yet this is exactly what the Louisiana Supreme Court has refused to do in the instant case, with the result being that the defendant was clearly denied a fair trial.

Your Honors can examine the testimony of the officer from the Tucson police and it will be readily apparent at once that there was no need whatever to go into the prior offense. What purpose did it serve? It served no purpose whatever except to seek to convince the jury that the defendant is a bad man. The language referring to an incomplete offense could not have served any useful purpose whatever, except to prejudice

the minds of the jurors herein — which it must have done.

During the course of oral argument in the Supreme Court of Louisiana, the Chief Justice made the statement to counsel for the defendant that in the event the District Attorney had sought to delete any reference to the prior offense, counsel for the defendant would have reserved a bill of exceptions under the provisions of LSA-R.S. 15:450, on the theory that the confession was not complete. Your Honors will note that the critical aspect of this criminal case or any other criminal case is not whether the District Attorney will commit reversible error— the critical thing in this case or any other criminal case is whether the defendant has a fair trial. This is where we respectfully submit that the Court erred.

Your Honors will also note that the District Attorney changed his approach from the time he first sought to enter the alleged oral statement into evidence in the Trial Court, to the time that he subsequently sought to justify the admission of the oral statement into evidence in the Supreme Court of Louisiana. This change of approach clearly indicates that the prosecution was grasping for a basis of making the evidence admissible, and if the defendant's rights were affected, it didn't matter to the prosecution.

In the decision of *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), the United States Supreme Court stated:

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The basic criticism of the rule generally permitting the admissibility of evidence of a prior offense within the confession and/or declaration against interest is that the accused has not taken the stand nor has he opened the door to any testimony relative to his good

character. In other words, according to the theory presented by the Louisiana Supreme Court in the instant case, any statement made by the defendant during the course of the confession must be admitted into evidence. However, such an analysis literally ignores the basic purpose of refusing to admit evidence of prior offenses, i.e., the jury is then confronted with the issue as to whether the defendant is a person with a "bad general record who is being denied a fair opportunity to defend against a particular charge." The Louisiana Supreme Court would appear to be interested only in the contents of the confession and/or declaration against interest, regardless of what the accused may have said concerning the prior offense or anything else. We respectfully submit that this is where the Honorable Supreme Court of Louisiana erred. The confession and/or declaration against interest in the instant case could certainly have been introduced without reference to the prior separate offense committed by the accused and without reference to the prior alleged incomplete offense. The confession and/or declaration in the instant case did not refer to these admissions as being so inseparably connected with the confession of the crime charged. In other words, the relevant portions of the confession relating to the crime charged herein could have been readily separated from those parts of the confession relating to the other or earlier crime. This is not a case where separation would have been impracticable; such separation could have clearly occurred without affecting the issue as to the confession relating to the instant offense charged herein.

We feel compelled to call Your Honors' attention to the fact that the reference to the prior offense was made by the District Attorney for Plaquemines Parish, Louisiana, in his opening statement, in the testimony of the police officer, and in the closing statement. The District Attorney for Plaquemines Parish here sought to obtain the benefit of any inference, innuendo, or connotation which could be attributable to the defendant's statement relative to the prior offenses, regardless of the remoteness of the offense, regardless of the fact that the offense was completely unrelated to the homicide herein in any manner whatever, and regardless of the fact that the confession and/or declaration against interest herein used could have come into evidence without any reference to the prior offense.

The alleged confession and/or declaration against interest herein is very analogous to the confession sought to be used by the prosecution in the case of *United States v. Jacangelo*, 281 F.2d 574 (3rd Cir., 1960), wherein one of the defendants in the course of a confession referred to a prior conviction of his co-defendant, and the Third Circuit Court of Appeal held that any reference to the prior conviction of the co-defendant was inadmissible and constituted reversible error. The Court stated:

> "Second, the evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. *Brown v. United States*, 3 Cir., 1936, 83 F.2d 383; *Helton v. United States*, 5 Cir., 1955, 221 F.2d

338. This was a far more serious matter than the technical objection to the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information. *Marshall v. United States,* 1959, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250.

"Third, and in our view very significantly, it would have been a simple and effective procedure merely to delete from the confession before its submission to the jury the one sentence stating that Jacangelo was 'on probation' and 'on bail'. The continuity would not have been destroyed. The author's admission of his own wrongdoing and his narration of the essential facts of the alleged conspiracy would not have been distorted or changed in any significant way. There would simply have been a proper elimination of a prejudicial collateral disclosure about Jacangelo without any attendant interference with the intended and appropriate use of the confession."

The constitutional rights of an accused in a criminal action have been regularly preserved and protected by this Court. We need not go any farther than the landmark decisions involving *Mapp, Gideon, Escobedo, Miranda,* and *Griffin.* In all of these decisions and in the other recent decisions emanating from this Honorable Court in the field of constitutional law and crim-

inal procedure, the glaring and the paramount feature is the right of an accused to fair play in the course of his trial. The basic premise of fair play underlying the decisions of this court similarly exist in the instant case.

In the instant case, the District Attorney for the Parish of Plaquemines sought to justify the admissibility of the statements made by the defendant during the course of his oral confession and/or declaration against interest on the basis of the prior offense showing a pattern and propensity toward serious and violent injury or harm so as to show intent in the homicide herein, under L.S.A.-R.S. 15:445 and 15:446. In the Louisiana Supreme Court, the District Attorney for the Parish of Plaquemines sought to justify the admissibility of the challenged statements herein under L.S.A.-R.S. 15:450, relating to using the confession, admission or declaration in its entirety. Your Honors will note that the accused herein never did testify, and, therefore, he never did place his character at issue, as provided by L.S.A.-R.S. 15:495.

Your Honors have highlighted the basis of the constitutional objection herein in the case of *Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967), wherein the dissenting opinion of Mr. Chief Justice Warren, concurred in by Mr. Justice Fortas, provides as follows:

> "* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would

> violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest the evidence of prior crime introduced for no purpose other than to show criminal disposition would violate the Due Process Clause * * *".

A leading secondary authority high-lights the criticism of the prior offense testimony in the presence of the jury as follows:

> "* * * The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. * * *"

See 1 Wigmore on Evidence, §57, p. 456.

The rule relative to admissibility of reference to prior offenses has long been the subject of criticism. See Comment, 78 Harvard L. Rev. 426 (1964); Comment, 70 Yale L. J. 763 (1961); 10 Rutgers Law Review, 531, 532 (1956); 3 Wigmore, Evidence, §896-918 (3rd ed. 1940).

We could refer Your Honors to numerous other authorities criticizing the rule permitting reference to prior convictions of the accused under certain circumstances. Regardless of the criticisms contained within

these authorities, we respectfully submit that the issue is primarily one of fairness — which crime is the accused having to defend against — one of which he was convicted prior to the instant case, or the crime with which he is charged in the instant case. The accused who has not taken the witness stand in his own behalf and who has not put the subject of his character or reputation at issue finds himself in the unfortunate predicament of having to go forward, one way or another, for the purpose of overcoming any adverse inferences which may result from the testimony brought out by the prosecution. In other words, the accused is guaranteed the right under Fifth Amendment of the United States Constitution that he shall not be compelled to testify against himself; similarly, any reference thereto by the prosecution has been held to be unconstitutional. See *Griffin v. State of California,* 380 U.S. 609; 85 S. Ct. 1229 (1965). Nevertheless, the reference to the prior offense is one which is completely foreign to the issue before the Court in the instant prosecution and the accused must seek to explain in one way or another. The accused may have pleaded guilty in the prior offense solely because of many circumstances which do not appear of record. This is clearly what happened in the instant case, as the accused had been charged with three offenses, and pleaded guilty to one, i.e., the crime against nature. Yet, because of the plea of guilty in the prior offense, the accused who has not taken the stand, who has not sought to place his character at issue is confronted with the duty to explain away the impression which the jury may have obtained that he is generally a bad man as distinguished from being an individual who has

been guilty of the crime with which he is charged in the instant case.

This Honorable Court has been constantly concerned with the issue of fairness in any trial of an accused. In *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), this Honorable Court granted a defendant a new trial where a newspaper account of the trial was read by several jurors, and in the article read by the jurors there was reference to prior convictions of the defendant. This Honorable Court ordered a new trial although the jurors reading the article stated that they would not be influenced thereby, and the Trial Judge stated that he felt there was no prejudice to the defendant. The issue presented herein is identical with the issue presented in *Marshall;* it is identical with the question raised in the dissenting opinion in *Spencer;* and it presents directly to the Court for adjudication the effect of "evidence of prior crimes introduced for no purpose other than to show criminal disposition * * * ". We respectfully submit that such evidence is clearly violative of the Due Process Clause.

As can readily be seen, the issue presented by Cardinale herein is a natural sequel to the decision of this Honorable Court in *Spencer*. How far does *Spencer* go? Does *Spencer* furnish any reason to believe that the basic concept of fair play in due process has been modified? Should *Spencer* be limited in its application to the recidicity statute, or will it go beyond those statutes to "hold that evidence of prior crimes introduced for no other purpose other than to show criminal disposition would violate the Due Process Clause?"

We respectfully submit that the issues presented herein should be resolved favorably to the petitioner herein. In the field of administration of criminal justice, the likelihood of a defendant being prejudiced because of an unfair admission into evidence concerning a prior offense is too great to be ignored. *Michelson, Spencer,* and *Marshall* all indicate that the procedure followed herein by the District Attorney for the Parish of Plaquemines was clearly unconstitutional. We, therefore, respectfully submit that the decree of the Louisiana Supreme Court should be reversed and that a new trial should be granted to the petitioner.

CONCLUSION

In conclusion, we respectfully submit that the judgment of the Honorable Supreme Court of Louisiana should be reversed, and that a new trial should be ordered herein.

Respectfully submitted,

NATHAN GREENBERG
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Gretna, Louisiana
ATTORNEY FOR
PETITIONER

CERTIFICATE

I hereby certify that a copy of the above and foregoing petition on behalf of plaintiff has been mailed to Hon. Jack P. F. Gremillion, Attorney General, State Capitol, Baton Rouge, Louisiana, Hon. Leander H. Perez, Jr., District Attorney, Parish of Plaquemines, Pointe a la Hache, Louisiana, and Hon. Preston Hufft, Assistant District Attorney, Chalmette, Louisiana, by postage prepaid.

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SUPREME COURT, U. S.

No. 76

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In the Supreme Court of the United States

PHILIP CARDINALE, JR.,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

Brief for Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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No. 76

In the Supreme Court of the United States

PHILIP CARDINALE, JR.,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Philip Cardinale, Jr., was charged by indictment of the Grand Jury that he did on or about August 10, 1965, murder one Mary Agnes Buford. Defendant was tried by a Jury and found Guilty as Charged. An appeal was taken to the Supreme Court of Louisiana and the conviction was affirmed. An application for a Writ of Certiorari to the Supreme Court of Louisiana was filed on May 6, 1968 and the writ was granted on November 25, 1968.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statutes and Constitutional Provisions involved are as follows:

1. LRS—TITLE 15: SECTION 450—"USE OF CONFESSION, ADMISSION OR DECLARATION IN ENTIRETY

Every confession, admission or declaration sought to be used against anyone must be used in its entirety so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

2. LRS—TITLE 15: SECTION 445—"INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED

In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

3. LRS—TITLE 15: SECTION 446—"EVIDENCE WHERE KNOWLEDGE OR INTENT IS ONE OF A SYSTEM

Where knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

4. LRS—TITLE 14: SECTION 30—"MURDER

Murder is the killing of a human being,

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the

perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill

Whoever commits the crime of murder shall be punished by death."

5. AMENDMENT XIV, U.S. CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I. IS LRS TITLE 15:SECTION 450 REQUIRING THAT ANY CONFESSION, ADMISSION OR DECLARATION USED AGAINST ANYONE MUST BE USED IN ITS ENTIRETY UNCONSTITUTIONAL?

II. IF THIS COURT HOLDS LRS TITLE 15: SECTION 450 UNCONSTITUTIONAL, DOES THE TESTIMONY IN QUESTION FALL WITHIN THE PROVISIONS OF LRS TITLE 15:SECTION 445, 446?

STATEMENT OF THE CASE

One Mary Agnes Buford was hacked to death

and her body left in a deserted, wooded area near the boundary line of Jefferson and Plaquemines Parishes. The defendant was from the town of Marrero in Jefferson Parish which is across the river from the city of New Orleans. The defendant picked up the said Mary Agnes Buford in a bar in the down town area of New Orleans, had several drinks with her in different bars and left the city of New Orleans with her in his car and proceeded across the river. Testimony revealed that at one time during the night he purchased gasoline at a filling station and the attendant heard a woman's scream from the trunk of his car as he drove off. The defendant remembered being at the scene, where the Buford girl's body was found, with blood on his hands and also in the trunk of his car. The defendant fled the scene, cleaned himself and his car and drove around town trying to decide what to do. He then fled the State of Louisiana. A warrant was issued for his arrest for the murder of Mary Agnes Buford.

The defendant eventually wound up in Tucson, Arizona and while walking on the streets of Tucson, flagged a police car and asked to be taken in. Before conversing with him both police officers warned him that he did not have to say anything; that anything he said could be used against him and that he had the right to contact an attorney. The conversation with the defendant was extremely informal and casual and under no duress, pressure, threats or promises whatsoever—the defendant was eager and anxious to converse so as to get it off his chest. He was talking to

police officers who, at the time of commencing the conversation, did not even know what, if any, charges were pending against him in the State of Louisiana. The defendant made a confession to the police officers in Tucson. Included in the confession was a reference by the defendant to another incident involving a girl. When the police officer took the stand he testified as to the entire confession received from the defendant. The police officer's testimony relative to the incident involving another girl is as follows:

> "Yes, he did. He told me that several months prior to this taking place, he picked up a woman whom he described as a prostitute down town in New Orleans and that after having several drinks together, they had intercourse and then in his statement, in his own words, 'She went down on me.' He said then, after an argument that she slapped him and he backhanded her. Then he said that a while later she signed a complaint against him for back handing her and that he received a sentence of 90 days of which he did 45 days. He said that immediately after getting out of jail from doing the 45 days that he went out and got a gun and looked for two or three nights for her down town in the area where he had first seen her with the intention of killing her because she had signed a complaint against him." (T. 509, 510)

It is the foregoing testimony which is the subject of this Petition for Writ of Certiorari.

ARGUMENT

I

IS LRS TITLE 15:SECTION 450 REQUIRING

THAT ANY CONFESSION, ADMISSION OR DECLARATION USED AGAINST ANYONE MUST BE USED IN ITS ENTIRETY UNCONSTITUTIONAL?

Counsel for defendant objected to the testimony of the police officer relative to the previous incident involving another girl but the Trial Judge overruled the objection and the entire confession was introduced in evidence. After considerable argument relative to confessions and the applicability of L.R.S. Title 15, Sections 445 and 446, the Trial Judge ruled that the entire confession was to be used. In this connection we find the following:

> L.R.S. Title 15: Section 450 "USE OF CONFESSION ADMISSION OR DECLARATION IN ENTIRETY
>
> Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The matter was appealed and the Supreme Court of Louisiana upheld the Trial Judge in the following language: (State v. Cardinale, 251 La. 827, 206 So. (2d) 510 (1968) Pages 842, 843.

> "We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.
>
> The same contention was made in State v. Maney, 242 La. 223, 135 So. 2d 473. Therein we

referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: 'Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.' And we held: 'The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution.'

The Maney holding was approved in State v. Evans, 249 La. 861, 192 So. 2d 103. See also State v. Bailey, 233 La. 40, 96 So. 2d. 34."

It must be recognized at this point that there is no objection whatsoever as to the admissability of the confession other than the reference to the previous incident referred to above. The confession was completely voluntary and within the guidelines of the Constitution of the United States and the decisions

of this Court. Defendant does not in any way attack the confession itself in these proceedings.

The petition by the defendant is based on the theory that the admission of the entire confession under L.R.S. Title 15, Section 450 is violative of the "general fairness" provisions of the Fourteenth Amendment. However, in support of this proposition he cites the dissenting opinion in *Spencer v. Texas*, 385 U. S. 560, 87 S. Ct. 648, 17 L.Ed.(2d) 606 (1967) and makes no reference whatsoever to the majority opinion of this Court in that case. A review of the *Spencer* decision will put this issue squarely in focus. On pages 653 and 654 we find the following clear enunciation of the principle involved in the decision:

> "and held that this Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-standing practice at issue. A Fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 629, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts."
>
> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749; *Betts v. Brady*, 316 U. S. 455, 625 Ct. 1252, 86 L. Ed. 1595; df. *Gideon v. Wainwright*, 372

U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2D. 799; see *Estes v. State of Texas*, 381 U. S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543; *Sheppard v. Maxwell*, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600; df. *Griffin v. People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. *But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."*** As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105, 545 Ct. 330, 332, 78 L. Ed. 674. See also *Bachalter v. People of State of New York*, 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492. Pages 653, 654 (Emphasis ours).

Further commenting on its inability to consider the matter before it in the *Spencer* case in a legislative or rule-making context, this Court had the following to say:

> "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. *It would be a wholly unjustified encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state created crimes in their own state courts, so long* as their rules are not prohibited by any provision of the United States Constitution which these rules are not." Page 656. (Emphasis ours)

The instant case is similar to the *Spencer* case in that both Cardinale and Spencer rely on the "general fairness approach" in an attempt to declare a State Statute unconstitutional—and Cardinale like Spencer finds no comfort in the decision of this Court in the *Spencer* case.

This Court had occasion to review its findings in the Spencer case when it had for consideration the case of *Burgett v. Texas*, 389 U.S. 109, 19 L. Ed. (2d) 319, 88 S. Ct. 258 (1967). In Burgett, the State under a recidivist statute made reference to a number of previous convictions in its opening statement but on the presentation of evidence to show one of the previous convictions it was discovered that the record of that proceeding failed to disclose that the defendant had been afforded the right of counsel. The introduction of the evidence was not allowed by the Trial Court and the jury was instructed to disregard the opening statement about this particular conviction. This Court held that the instructions to the jury would not suffice and that since the defendant has been denied a "specific federal right" the conviction would be set aside.

It is important to note that the questions presented in *Spencer* and *Burgett* were entirely different. In *Spencer* the defendant sought to set aside a state rule of evidence on the basis of the "general fairness approach" to the Fourteenth Amendment whereas in the *Burgett* case a "specific federal right" was denied the defendant. In the instant case Cardinale finds himself in the same position as *Spencer*—both are relying on the "general fairness approach." Nei-

ther Spencer nor Cardinale could allege a violation of a "specific federal right". In this connection we find the following pertinent language in the *Burgett* case on page 325:

> "our decision last term in Spencer v. Texas 385 U. S. 554, 17L Ed (2d) 606, 87 S. Ct. 648 is not relevant to our present problem. In Spencer the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted "in the procedures before us. . . . no specific federal right—such as that dealing with confessions —is involved; reliance is placed solely on a "general fairness approach". Id, at 565, 17 L. Ed (2d) al 615. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless Gideon v. Wainwright is to suffer serious erosion."

Surely the provisions of LRS Title 15: Section 450 fall within the decision of this Court in the *Spencer* case—the Spencer case allowed the States in accordance with their own rules and statutes to present to the jury information concerning prior convictions so as to enhance the punishment whereas the Louisiana Statute has required the State in the use of a confession to present the confession in its entirety. The testimony objected to in the instant case was the defendant's own words given in a confession—a confession which has met every test imposed by the Constitution and the decisions of this Court. The Louisiana Statute applies to every confession and no prose-

cutor is granted the opportunity or option to determine what parts of a confession he will or will not present for the consideration of the jury. The prosecutor is bound by this rule to present the entire confession so the jury will have the opportunity to examine and give full weight and consideration to the entire comments of the defendant including any exculpation and explanation that may be contained therein. Through such a system the defendant is assured that the jury will receive and weigh his confession in the same way in which it was given by him. The State had no alternative in this matter—it was required to follow the rule of evidence established by State Statute.

LRS Title 15:Section 450 is a rule of evidence in the Louisiana judicial system, has been for many years and plays an important role in the fair conduct of all trials. In arriving at its decision in the Cardinale case the Supreme Court of Louisiana cited and relied on its decision in Cf. *State v. Evans, supra*, on which this Court refused to grant a Writ of Certiorari.

The defendant would have this Court take unto itself the legislative and rule-making power by rewriting the provisions of LRS 15:450 to suit what the defendant believes the statute should contain. In emphatic language in the *Spencer* case this Court has declared that it will take no such powers unto itself.

It is submitted that LRS Title 15:Section 450 is not violative of the Fourteenth Amendment and the decision of the Supreme Court of Louisiana should be upheld.

II

IF THIS COURT HOLDS LRS TITLE 15:SECTION 450 UNCONSTITUTIONAL, DOES THE TESTIMONY IN QUESTION FALL WITHIN THE PROVISIONS OF LRS TITLE 15:SECTIONS 445, 446?

If this Court were to hold that LRS Title 15:Section 450 is violative of the Constitution of the United States it is the position of the State that this testimony would still be admissible under the following provisions of Louisiana law:

> LRS Title 15: Section 445-"INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED
>
> In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction"
>
> LRS Title 15:Section 446-"EVIDENCE WHERE KNOWLEDGE OR INTENT IS MATERIAL AND WHERE OFFENSE IS ONE OF A SYSTEM
>
> When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

The State in attempting to introduce the testimony of

the police officer relative to the incident involving another girl has always taken the position that it was admissible as a part of the confession and further because the testimony was relevant under the statutes quoted above. The State was very strong in that position and still is. In the majority opinion of the *Spencer* case, this Court recognized that over and above the Texas recidivist statute some of the prior convictions might have been admissible to show such things as intent, an element in the crime, malice, motive, a system of criminal activity, or when the defendant raised the issue of his character. The dissenting opinion concerned itself with the introduction of such evidence only if it met the "traditional occasions" calling for such admission. The State submits that the evidence introduced through the testimony of the police officer meets the tests laid down by this Court—that this testimony meets these "traditional occasions." In this respect, this same reasoning is followed by the Supreme Court of Louisiana. For example we find the following Louisiana cases:

> "Evidence of other crimes similar to that charged and admissible when it shows or tends to show a particular criminal intent, which is necessary to constitute the crime charged. Any fact which proves or tends to disprove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime.
>
> This Court has recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged it is proper to admit proof of similar but disconnected crimes

to show the intent with which the act charged was committed." State v. Cupit, 189 La 509, 179 So. 837, 838(1938)

"These bills were taken to the Court permitting two witnesses, Glenda Dale Jenkins and Clyde Coombs, to testify as to the commission by these defendants of a prior armed robbery of another bus operator at a location in the vicinity of the instant shooting, and to the *attempted* armed robberies of several places of business in the general locale of defendant's residences. (Emphasis ours)

Generally, evidence of other crimes, even those similar in nature, is admissible to prove intent when it is a necessary ingredient of the crime charged." State v. Evans, 249 La 861, 192 So(2d) 103, 106(1966)

"This accused was charged under the first paragraph of LRS 14:30 which recites:

> 'Murder is the killing of a human being, (1) When the offender has a specific intent to kill or to inflict great bodily harm; * *'.

Accordingly, it was necessary for the state to show an intent to kill, and for that purpose the evidence of Lt. Lawson respecting a prior similar crime was relevant and admissible." State v. Morris, 245 La 475, 157 So 2, 729, 730 (1963).

The defendant in the instant case was charged with the crime of murder under the first paragraph of LRS Title 14:Section 30 which provides as follows:

MURDER

> Murder is the killing of a human being (1) When the offender has a specific intent to kill or to inflict great bodily harm;

The State had the burden of proving specific intent under the statute and the introduction of the police officer's testimony was in furtherance of carrying that burden.

The defendant in his brief makes the assertion that the State has abandoned the position that the testimony was admissible also under LRS Title 14:-Sections 445 and 446 because of the decision of the Supreme Court of Louisiana in *State v. Rives*, 193 La. 186, 190 So 374 (1939). Nothing could be further from the State's position than such an assumption—the State believed then and believes now that the testimony falls within the exceptions set forth by the jurisprudence. The defendant in his brief contends that *State v. Rives* stands for the proposition that only completed offenses may be testified to and that incompleted offenses are excluded from any such testimony. No where in the *Rives* case is there to be found a basis for such a conclusion and the very wording of the statutes indicates this is not so—under the statute testimony may be offered of acts, conduct or declarations of the accused.

Rives was charged with the larceny of three cows

from a Mr. Wright. Testimony was introduced that some time prior to the larceny with which he was charged Rives asked two persons if they would steal some cows with him from Nelson's Dairy. The Supreme Court of Louisiana reversed the conviction not on the grounds that the testimony concerned an incomplete offense but on the grounds that its introduction did not bear directly and materially upon, and have some connection with the issue before the jury. The Court in a lengthy discussion pointed out that intent in the crime of larceny must arise out of the facts and circumstances surrounding the particular case and evidence to show intent could not be admitted except to rebut the claim of the defense that the taking was a mistake, accident, or misadventure. Since the record in *Rives* was barren of any of these positions being taken by the defendant, the Court would not assume that this testimony was to rebut a position taken by the defendant and properly excluded the testimony. Since the element of intent in the case of larceny arose out of the facts and circumstances surrounding the particular case, the introduction of prior incidents in the absence of a defense raised by the defendant did not bear directly and materially upon the issue before the jury.

The State concurs in the holding in the *Rives* case but points out that the instant case is different on the facts. In the instant case we are dealing wih the crime of murder and the specific intent to take the life of another or to inflict great bodily harm. The proof of intent is essential to the State's case in a murder trial and testimony of similar acts are admissible.

Let us now look at the testimony of the police officer with respect to the prior incident in the light of what happened in the murder of Mary Agnes Buford and see if these cases are similar and if it throws some light on the legitimate purposes of LRS —Title 15: Sections 445 and 446. In the prior incident Cardinale went from his home in Jefferson Parish across the river to the downtown area of New Orleans, picked up a girl in a bar, had several drinks with her in different bars, had intercourse and committed an unnatural act, backhanded the girl, was charged by the girl for backhanding her, was sentenced, served time, was released and after obtaining a gun spent two or three nights in this same downtown area searching for this girl to kill her for having filed a complaint against him because of his conduct. In the Buford murder the defendant went from his home in Jefferson Parish across the river to the same downtown area of New Orleans, picked up Mary Agnes Buford in a bar, had several drinks with her in different bars, left the area with Mary Agnes Buford in his car and remembers being in his car with his hands, clothing and trunk of his car covered with blood in the same area as the body of Mary Agnes Buford was found. The incidents are the same —the first person complained but got away with her life when Cardinale could not find her—the second person was not quite so lucky, she was murdered before she could complain.

It is submitted that the testimony introduced in this trial clearly falls within the provisions of LRS

Title 15: Sections 445 and 446 and the ruling of the Supreme Court of Louisiana should be affirmed.

Before closing it is felt that brief comment should be made relative to remarks in defendant's brief that "if the defendant's rights were affected, it did not matter to the prosecution." No comment to these remarks was made in the opposition to the application but their reappearance in the brief just submitted to this Court clearly calls for some comment. The defendant's brief seems to attach considerable weight on a so called switch of position on the part of the State. The State's position is the same today as it was at the time of the trial and if one will check the opening arguments on the admissibility of the evidence (T Page 233) it will be shown that the State presented a two pronged approach for the introduction of this testimony—just as it does in this brief and in its brief before the Supreme Court of Louisiana. Further commenting on the question of protection of the rights of the defendant it should be noted that the State only used the words of the defendant himself in referring to the prior incident—there was no introduction of the court record, the calling of the girl involved, etc. Even before this Court rendered its decision in *Whitherspoon v. Illinois* 20 L. Ed (2d) 776, the State in the prosecution of Cardinale, operating under a statute similar to Illinois, did not challenge a prospective juror because he was opposed to capital punishment but pursued the questioning to such an extent that the juror stated that although he was opposed to capital punishment he would not say that he

could not under any circumstances bring in a capital verdict. Such a juror did in fact serve on the jury which found Cardinale Guilty as Charged.

It is respectfully submitted that the ruling of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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ATTORNEYS FOR
RESPONDENT

CERTIFICATE

I. Preston H. Hufft, a member of the bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing brief has been mailed to counsel of record, Nathan Greenberg, Esq., 848 Second Street, Gretna, Louisiana by postage prepaid.

Preston H. Hufft

SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1968.

Philip Cardinale, Jr., Petitioner, v. State of Louisiana.	On Writ of Certiorari to the Supreme Court of Louisiana.

[April 1, 1969.]

Mr. Justice White delivered the opinion of the Court:

Petitioner brutally murdered a woman near New Orleans, and then fled the State. He had been seen with his victim, and a warrant was issued for his arrest. In the course of his flight petitioner came to Tucson, Arizona, where he decided to surrender. He flagged down a police car and, after an interruption by the police to warn him that he need not speak, that his speech might be used against him, and that he had a right to contact an attorney, he was taken to the station house and poured out a confession. His confession was introduced in its entirety in the subsequent trial for murder in which petitioner was convicted and sentenced to death. Petitioner does not now contend that his confession was involuntary or that his admission of guilt to the Tucson police was inadmissible in evidence. He objects solely to the admission of those parts of his confession which he argues were both irrelevant and prejudicial in his trial for murder. A Louisiana statute requires that confessions must be admitted in their entirety, 15 L. S. A.–R. S. § 450, and petitioner contends that this is unconstitutional.

Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide

federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller* v. *Nicholls*, 4 Wheat. 311, 315 (1819), and since. *E. g. Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160–163 (1945); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940); *Whitney* v. *California*, 274 U. S. 357, 362–363 (1927); *Dewey* v. *Des Moines*, 173 U. S. 193, 197–201 (1899); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U. S. C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio*, 385 U. S.

92 (1966), they should be given the first opportunity to consider them.

In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for want of jurisdiction.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS concur in the dismissal of the writ, believing it to have been improvidently granted.